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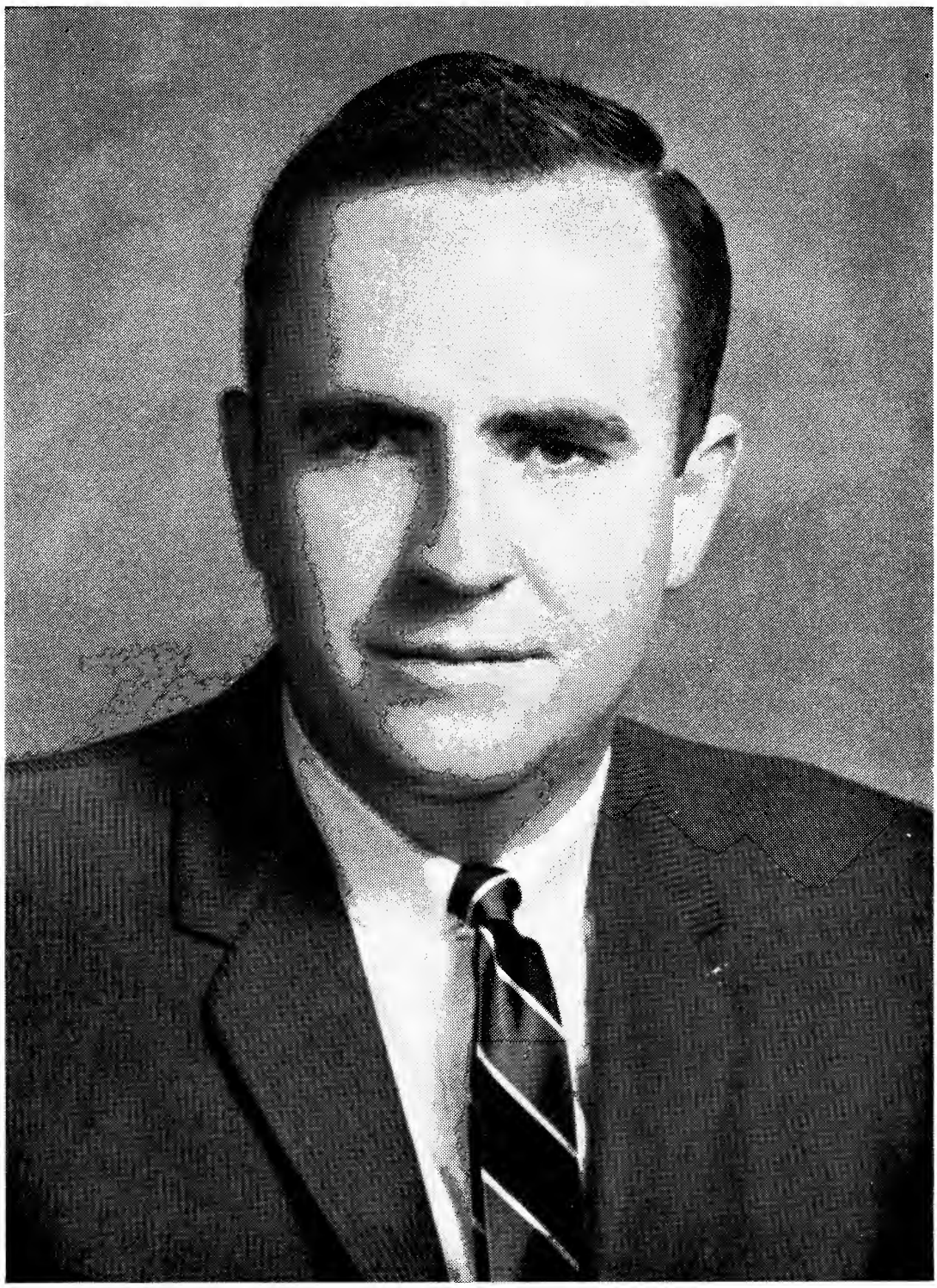

WILLIAM F. HARVEY

VOLUME 7 1973 NUMBER 1

INDIANA LAW REVIEW

ON THE APPOINTMENT OF DEAN WILLIAM F. HARVEY

It is a singular privilege to write the foreword to this issue of the *Indiana Law Review,* dedicated to and in honor of Dean William F. Harvey.

Having been introduced by our mutual friend, the Honorable Harold R. Fatzer, Chief Justice of the Kansas Supreme Court, we first met in 1968, prior to his assuming his teaching duties at the law school. Our friendship has constantly grown, as have my admiration and respect for him as a conscientious, forthright person. His integrity, intellectual honesty, and complete devotion to the law and its teachings are evidence of a sincere dedication to academic excellence. Such is a goal of crucial importance if we are to maintain high standards of professional conduct and performance. As a personal observation, resulting from our association and discussions, and my witnessing his unselfish service to the legal profession and judiciary of the State of Indiana as a lecturer, discussion leader, and panel member at many legal seminars, Dean Harvey has profoundly impressed me with the breadth and depth of his legal knowledge. Likewise, as a mentor, he has been a source of inspiration to his students.

The bench and bar of our state recognize Bill Harvey's superlative legal scholarship and ability, which he has demonstrated in his legal writings and lectures. This stature has been achieved in the brief span of five years— an accomplishment unequalled by any member of our profession in the legal history of our state.

The members of our profession and law students—past, present, and future—owe a debt of gratitude to President Ryan and the members of the Board of Trustees of Indiana University for selecting William F. Harvey as dean of the law school. I confidently believe that Dean Harvey's leadership will strengthen and accelerate the law school's growing national reputation.

The Honorable Warren E. Burger, Chief Justice of the United States, in a letter to me dated February 15, 1973, best characterized Dean Harvey when he wrote: "His is the solid, progressive spirit we need in the training of lawyers." And, I respectfully concur.

DONALD H. HUNTER
Justice of the Indiana
Supreme Court

SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

The Staff of the *Indiana Law Review* is pleased to publish its first annual Survey of Recent Developments in Indiana Law. This survey, combining a scholarly and practical approach to recent cases and statutes, emphasizes new developments in Indiana law. No attempt has been made to consider all cases decided or statutes passed during the survey period. This survey covers the period from January 1, 1972, through May 31, 1973. In the future, the survey period will be one year, from June through May.

I. ADMINISTRATIVE LAW*

That the myriad administrative agencies of government through rule-making and adjudication play a paramount role in setting the values and standards by which people order their everyday lives cannot be gainsaid.[1] Indeed, the significance of the judicial process pales in importance when measured against the direct and frequent impact the administrative process has on the individual.[2] The performance of these pervasive administrative functions is perhaps best characterized as discretion.[3] This discussion is designed to explore judicially imposed constraints on the exercise of administrative discretion in the context of employment termination hearings, workmen's compensation, Industrial Board appeal procedures, standing to challenge admin-

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*Donald J. Polden, William H. Stone, John J. Thar, John F. Vargo.

[1]*See* FTC v. Ruberoid Co., 343 U.S. 470 (1952) (Jackson, J.):

> The rise of administrative bodies probably has been the most significant trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.

Id. at 487. *See also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.02 (1958) [hereinafter cited as DAVIS].

[2]For a discussion of the extensiveness of this administrative penetration, see 1 DAVIS § 1.02 (1970 Supp.). For an early treatment of the problems presented to the legal system by the emergence of the administrative process, see Wyzanski, *The Trend of the Law and Its Impact on Legal Education*, 57 HARV. L. REV. 558 (1944).

[3]Discretion in the administrative process "refers to an area within which agencies may choose freely between alternative courses of action, basing decisions on *ad hoc* considerations." 1 F. COOPER, STATE ADMINISTRATIVE LAW 31-32 (1965) [hereinafter cited as COOPER]. Though discretion is essential to the effective functioning of administrative agencies, there is a recognized need to accommodate this concern for efficiency with the need for principled decision. *See id.* 43.

istrative decisions, and the availability of equitable relief pending appeal of Alcoholic Beverage Commission decisions.[4]

A. Administrative Due Process and Combination of Functions

Recent United States Supreme Court decisions, provide a principled basis upon which to examine the source and scope of the constraints upon administrative discretion. In a series of recent opinions the Court has emphasized the importance of hearings as a safeguard against arbitrary deprivations of protected interests by governmental authority.[5] Concomitantly, the Court has expanded the categories of protected interests consistent with notions of "property" endemic to a society in which the government regulates and/or controls the essentials of life.[6] While the Court has spelled out the rudiments of procedural due process in hearings,[7] it has largely left open the question of the permissibility of specific administrative hearing procedures.

In order to serve the primary fourteenth amendment value of guarding against capricious governmental action, Indiana courts

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[4]The interjection of procedural constraints serves the function of enhancing the likelihood of principled adjudication and thus reduces the danger that decision-making will merely mirror the predilections of the hearing officer. This potential for biased decision forms the basis for much of the criticism of administrative adjudication procedures. *See, e.g., id.* 40; Clark, *Administrative Justice*, 13 AD. L. REV. 6, 8 (1960).

[5]*See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[6]*See* cases cited note 5 *supra*. For a discussion of the need to recognize new categories of property, see Reich, *The New Property*, 73 YALE L. J. 733 (1964). Accompanying these developments is an erosion of the "privilege doctrine" as a limitation on the need to afford affected parties a hearing when governmentally granted interests are involved. *See* DAVIS §§ 7.11-.12; W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 548-55 (1954); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). The characterization of the interest at stake should properly elucidate the scope of the hearing warranted by the interest and the level of judicial review it will trigger. Judicial determination of the interest should not work to eliminate a hearing right and thus permit the government to act arbitrarily. For an analysis of United States Supreme Court treatment of the "privilege doctrine," see Davis, *Requirement of a Trial Type Hearing*, 70 HARV. L. REV. 193, 222-32 (1957), in which the author discusses the proper office of the "privilege" concept as a tool to curtail adjudicative hearings.

[7]While the requisites will vary with the interest at stake, an implementation of the requirement that a person have notice and opportunity to be heard generally requires personal appearance, representation by counsel if desired, presentation of evidence, and confrontation and cross-examination of witnesses. *See* cases cited note 5 *supra*.

have required administrative boards to afford persons a "meaningful hearing" free from bias, hostility, or prejudgment.[8] The emerging issue is the identification of procedural factors which will constrain a reviewing court to hold that an administrative board has violated this mandate. Three Indiana cases have recently addressed the problem of defining the contours of due process in administrative hearings.

In *Guido v. City of Marion*,[9] *City of Mishawaka v. Stewart*,[10] and *Doran v. Board of Education*[11] the Indiana Court of Appeals was presented with the question of whether a combination of investigative, prosecutorial, and adjudicative functions in the same hearing body amounted to a denial of due process. All three opinions reiterated the accepted rule that a combination of functions is not a per se violation of due process in the sense that the bias inherent in such function combinations vitiates the possibility of a fair hearing.[12] However, the approaches taken in reviewing the several boards' decisions indicated that the court was attuned to the problem of such inherent bias.

In *Guido* and *Stewart* the Third District refused to disturb employment dismissals when the record revealed facts from which a reasonable man could have reached the same decision.[13] Though ostensibly an application of the substantial evidence rule,[14] the court's willingness to critically peruse the record can be viewed as an expression of its appreciation of the heightened potential

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[8]Tippecanoe Valley School Corp. v. Leachman, 261 N.E.2d 880 (Ind. 1970); State *ex rel.* Felthoff v. Richards, 203 Ind. 637, 180 N.E. 597 (1932); Tryon v. City of Terre Haute, 136 Ind. App. 125, 193 N.E.2d 377 (1963). *See also* Fuchs, *Judicial Control of Administrative Agencies in Indiana*, 28 IND. L.J. 293, 310-22 (1953).

[9]280 N.E.2d 81 (Ind. Ct. App. 1972).

[10]291 N.E.2d 900 (Ind. Ct. App. 1973).

[11]283 N.E.2d 385 (Ind. Ct. App. 1972).

[12]Marcello v. Bonds, 349 U.S. 302 (1954); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Fahey v. Mallone, 322 U.S. 245 (1946). For discussions of the combination of functions problem, see 1 COOPER 339-43; 2 DAVIS § 1302; Cary, *Why I Oppose the Divorce of the Judicial Function From Federal Regulatory Agenies*, 51 A.B.A.J. 33 (1965); Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389 (1948).

[13]280 N.E.2d at 86; 291 N.E.2d at 904.

[14]For a discussion of the use of the "substantial evidence rule" as a device for limiting the scope of judicial review, see Note, *Judicial Review of Removals of Municipal Policemen and Firemen in Indiana*, 26 IND. L.J. 397, 401 n.9 (1951).

for bias when functions are combined.[15] Of similar import is the decision in *Doran* in which the First District held that it was inherently unfair for a board to receive *ex parte* evidence from a lawyer serving as both legal adviser and prosecuting attorney for the school board.[16] Such a procedure, the court stated, held too great a potential for prejudgment to pass constitutional muster.[17] In this setting the *Doran* appellant was substantially prejudiced in that he was not afforded an opportunity to cross-examine or rebut the evidence upon which the board purported to rely. The court suggested that the proper procedure would have been for the attorney to have avoided discussion of the case with board members prior to the hearing.[18] This judicial explication of procedural proprieties coupled with the blanket statement that the conduct in issue was a gross abuse of discretion signaled a judicial cognizance of the need to insulate individuals from the type of bias which inures in combination of functions situations.

The impression that *Doran* involved more than a case in which the board clearly provided only a sham hearing is butressed by a review of the cases cited to support the holding. In *Jeffersonville Redevelopment Commission v. City of Jeffersonville*[19] the fatal defect was that the appellant had not been permitted to examine any of the city's witnesses. In *Monon Railroad v. Public Service Commission*[20] the critical hearing was entirely *ex parte* and subsequent to the formal hearing. Neither of these cases is entirely on point with the situation in *Doran* in which the appellant was permitted to examine witnesses as to the truth of the allegations against him and the *ex parte* investigation preceded the hearing. The court could have adopted these distinctions and affirmed the trial court's dismissal of the action on the ground that the evidence offered at the hearing provided a substantial basis for the decision and that the plaintiff-appellant had not been substantially prejudiced by the indiscreet actions of the board in eliciting *ex parte* evidence. The refusal to take

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[15]The willingness of reviewing courts to subject administrative actions to higher scrutiny when institutional or personal bias is more likely to color the determination has been embraced as an enlightened judicial reaction to a recognized problem. 1 COOPER 349; 2 DAVIS § 12.04, at 165.

[16]283 N.E.2d at 389.

[17]*Id.*

[18]*Id.* at 391.

[19]248 Ind. 568, 229 N.E.2d 825 (1967).

[20]241 Ind. 142, 170 N.E.2d 441 (1960).

this approach can be interpreted as a judicial hesitancy to provide hearing officials with *carte blanche* to ignore procedural niceties under the guise of a constitutionally permissible combination of functions.

While it is difficult to discern exactly what legal significance Indiana courts afford the combination of functions challenge to procedural fairness, the following suggestions appear warranted. Function combination is constitutionally permissible and perhaps essential when small local boards are charged with performing quasi-judicial functions. That is, the recognized evil of institutional bias will not cause a board to disqualify itself. However, such boards are concomitantly charged with a duty to avoid *ex parte* investigations and communcations which may taint their formal determinations with due process infirmities. Finally, function combination should trigger heightened judicial review of both the record and the factual complex surrounding the hearing. Such intensified review should serve as an additional safeguard against an abuse of discretion by administrative officials and insure future respondents a "meaningful administrative hearing."[21]

B. Findings of Fact

In *Transport Motor Express, Inc. v. Smith*[22] the court of appeals reversed and remanded an award of the Industrial Board with instructions "to certify to the court . . . the findings of fact on which its award is based, said findings being specific enough to permit this court intelligently to review said award."[23] A second award was certified to the court, and in the second opinion[24] the court again addressed itself to essentially the same issue in an attempt to clarify how specific a finding of facts must be.[25] This award was also reversed and remanded with instructions to find the essential facts specifically and in such pertinent detail that the appellate court would be able to intelligently review the award.[26]

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[21] *See* cases cited note 8 *supra*.

[22] 279 N.E.2d 262 (Ind. Ct. App. 1972) [hereinafter cited as *Transport Motor I*].

[23] *Id.* at 266.

[24] 289 N.E.2d 737 (Ind. Ct. App. 1972) [hereinafter cited as *Transport Motor II*]. [When the reference is to both opinions, the citation will be *Transport Motor*].

[25] *Id.* at 744.

[26] *Id.* at 754.

The *Transport Motor* opinions represent a radical departure from prior standards for judicial review of administrative findings.[27] Rather than accepting general findings which merely recite the language of a statute, the court of appeals required that findings of fact be specific and detailed.[28] The significance of the specific findings issue is illustrated by the fact that seven cases have been reversed and remanded on the authority of *Transport Motor*.[29]

Transport Motor II[30] represents a painstaking attempt by the court of appeals to provide agencies and attorneys with guidance as to what a specific finding of fact is and how it can be achieved. The essence of *Transport Motor II* is founded upon the purposes served by the specific findings requirement. Specific findings of fact not only enable a reviewing court to decide whether or not an award is contrary to the law but also explain to the parties how they won or lost their cases.[31] Furthermore, when an agency is required to demonstrate that the award granted is consistent with the basic facts disclosed by the evidence, better reasoned and more fully informed decisions are assured.[32]

Though agencies have the obvious burden of making specific findings of fact, parties have the practical burden of assisting an agency by making available proposed findings of the facts they

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[27]Although *Transport Motor II's* standard was directed to the Industrial Board, it applies to all administrative bodies whose findings of fact are binding on the reviewing court. Carlton v. Board of Zoning Appeals, 252 Ind. 56, 245 N.E.2d 337 (1969); Kosciusko County R.E.M.C. v. Public Serv. Comm'n, 222 Ind. 666, 77 N.E.2d 572 (1948); Allis Chalmers Mfg. Co. v. Review Bd. of Ind. Employment Sec. Div., 121 Ind. App. 227, 98 N.E.2d 512 (1951).

[28]For a history of the Indiana appellate courts' past approaches in this area, see B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 12.7 (1950).

[29]Rivera v. Simmons Co., 298 N.E.2d 477 (Ind. Ct. App. 1973); Estey Piano Corp. v. Steffen, 295 N.E.2d 855 (Ind. Ct. App. 1973); TRW, Inc. v. West, 293 N.E.2d 517 (Ind. Ct. App. 1973); Bohn Aluminum & Brass Co. v. Kinney, 291 N.E.2d 705 (Ind. Ct. App. 1973); Page v. Board of Comm'rs, 283 N.E.2d 571 (Ind. Ct. App. 1972); Johnson v. Thomas & Skinner, Inc., 282 N.E.2d 346 (Ind. Ct. App. 1972); Robinson v. Twigg Indus., Inc., 281 N.E.2d 135 (Ind. Ct. App. 1972).

[30]289 N.E.2d 737 (Ind. Ct. App. 1972).

[31]289 N.E.2d at 742, *quoting from* B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 12.7 (1950).

[32]*Id.* at 744.

contend should be found.[33] These proposed findings should also meet the requirement of being specific enough for intelligent review.[34] Consequently, attorneys and agencies become more aware of the actual problems they face when they are required to work with specifics. Logically, the law should become clearer in its application as precise questions are specifically reviewed, rather than as vague questions are generally reviewed.

The full effectuation of the policy purposes underlying the *Transport Motor II* standard cannot be attained until there is an understanding of what is meant by a "specific and detailed finding of fact". A reading of the *Transport Motor II* opinion reveals the following three points. First, although the court accurately uses such terms as "subsidiary," "basic," "detailed," "underlying," "evidentiary," and "ultimate" throughout the opinion, the terms are neither necessary nor important to working with the *Transport Motor II* requirement.[35] Second, the opinion does not require that there be a specific finding of fact on every element of a claimant's burden of proof, but only on those elements which are disputed.[36] Third, when there exists a disputed issue between the parties, the facts upon which the resolution of the disputed issue is based must be stated and explained. These three points can best be illustrated by the following example.

Claimant appears before Agency contending that he is eligible for an award. By statute, Agency can only grant an award if elements X, Y, and Z are proved. Party also appears before Agency and contends that Claimant is not eligible for an award because element X does not exist. Party does not dispute the existence of elements Y and Z. At this point, since there is no dispute between Claimant and Party as to the existence of elements Y and Z, it is rather unimportant whether Agency makes specific findings of fact or merely utters the general language of the statute when rendering a decision as to elements Y and Z.[37]

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[33] *Id.* at 750.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 744.

[37] An illustration of an adequate finding with respect to the uncontested elements Y and Z is—if Y equals "an accidental injury" and Z equals "in the course and scope of employment," then the finding that C sustained "an accidental injury in the course and scope of his employment" though "general to the point of [complete] obscurity" is acceptable to the court. *Id.* at 745. However, should Y and/or Z be disputed, then such a general finding is inadequate.

Thus, Y and Z, though elements of Claimant's burden of proof, are not elements of specific inquiry.

The unimportance of Y and Z, however, magnifies the importance of X. Element X is now the "basic issue"[38] before Agency, and the "contested issue"[39] or point of dispute between Claimant and Party.[40] The existence or nonexistence of element X must be supported by specific findings of fact. Claimant and Party introduce evidence designed to show facts that will prove or disprove the existence of element X.

Agency now has before it all the evidence from which it must find the "underlying or basic"[41] facts upon which the resolution of the existence or nonexistence of element X will be based. Should Agency decide in favor of Claimant, minimum specificity requires Agency to explain why Claimant's evidence[42] shows the facts which prove X's existence. However, a proper finding is not limited to Claimant, but also explains why Party's evidence fails to show facts and/or why facts fail to prove the nonexistence of element X.[43]

When Agency resolves the dispute between Claimant and Party by stating and explaining why element X exists in terms of *all* the "underlying or basic" facts, the findings of fact made attain the degree of specificity required by *Transport Motor II*. For then the court knows precisely what Agency meant when it rendered the award, and the court is not required "to determine the credibility of witnesses, . . . resolve conflicts, . . . choose between permissible inferences nor to presume with what result" Agency evaluated the evidence.[44] This constitutes an intelligent review.

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[38]The "basic issue" before the Industrial Board and the court of appeals in both *Transport Motor* opinions was whether or not Transport Motor Express, Inc., was a coemployer of the deceased. *Id.* at 739. The "basic issue" is also referred to as the question of "ultimate fact." *Id.* at 740.

[39]The "contested issue" is also referred to as the "disputed issue" or the "ultimate fact." *Id.* at 744.

[40]Claimant and Party should submit proposed findings of fact on the "disputed issue."

[41]289 N.E.2d at 747.

[42]*Id.* at 746.

[43]*Id.* at 747.

[44]*Id.* The simplified example implies that Claimant's evidence would prove different "basic facts" than would Party's evidence. However, should the "basic facts" be stipulated, Claimant's evidence would attempt to show different "factual inferences" than would Party's evidence. If Agency simply stated the "basic facts" in its findings, the findings would not be suf-

Thus, in rendering the award, Agency would state that element X exists, state why it exists in terms of Claimant's evidence and facts, and state why Party's evidence and facts fail to contradict the existence of element X. Once element X is determined, conceded elements Y and Z are stated, and Agency answers the statutory question that X, Y, and Z equal an award. Should Agency have found for Party in this example, thereby rendering a negative award,[45] the same degree of specificity would be required to explain why Party's evidence proves the nonexistence of element X and why Claimant's evidence fails to prove X's existence.[46]

Assuming Claimant has won, and Party appeals from an award based upon specific findings of fact, it is incorrect for Party to raise as an issue the sufficiency of the evidence to sustain the award.[47] This is easily understandable since, in terms of the example, Party is arguing that the evidence does not equal X, Y, and Z. Party's correct approach is to argue that Claimant's evidence is insufficient to sustain any specifically challenged fact

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ficiently specific. In this instance, it is the "factual inferences" which are in dispute and Agency must explain which inferences are chosen and why. Basic facts and factual inferences can be disputed simultaneously. *Id.* at 745.

[45]In this example Claimant has the burden of proof.

[46]289 N.E.2d at 747. This example does not cover the situation in which Claimant fails to submit any evidence to prove element X. In such a case, a proper finding by Agency would be that element X does not exist because there is "no evidence" showing that it does. *Id.* at 745. The court stressed the fact that such a situation requires a "no evidence" finding. It was also noted that when an agency renders a negative award, there must be specific findings. Nonetheless, the court discussed a Massachusetts procedure of searching the record before requiring a specific finding to determine if there is any evidence which would warrant a contrary finding. If no evidence was found, the court would affirm the negative award. *See* Roney's Case, 316 Mass. 732, 56 N.E.2d 859 (1944). After recognizing the Massachusetts procedure, the court indicated that it would not be utilized until some "future" case warranted it. It appears, however, that the "future" was that same day when the court affirmed a negative award of the Industrial Board by examining the evidence of record and concluding that the evidence did not lead inescapably to the opposite conclusion. Robinson v. Twigg Indus., Inc., 289 N.E.2d 733 (Ind. Ct. App. 1972). The correctness of the *Robinson* decision is unimportant. However, its reasoning marks a dramatic departure from that of *Transport Motor II* in the area of negative awards. Nevertheless, it now appears that *Robinson* has been subjugated to *Transport Motor II* in light of the reversal and remand in Rivera v. Simmons Co., 298 N.E.2d 477 (Ind. Ct. App. 1973).

[47]289 N.E.2d at 749. *See* Cole v. Sheehan Constr. Co., 222 Ind. 274, 281, 53 N.E.2d 172, 175 (1944).

found which supports the existence of element X or that the evidence requires the finding of a pertinent fact which Agency failed to find. Likewise, Party can argue that the specific facts found are insufficient to prove element X.[48]

C. Injunctive Relief from Administrative Actions

In *State ex rel. Indiana Alcoholic Beverage Commission v. Lake Superior Court*,[49] the Indiana Supreme Court held that the separation of powers doctrine restricted the court's power to enjoin administrative action. The Lake County Superior Court stayed the execution of a Commission order revoking plaintiff's liquor license pending judicial review. After the scheduled license expiration date, the Commission brought an original action in the supreme court for a writ of prohibition and mandate forbidding the superior court from further restraining the Commission from closing the plaintiff's premises.[50] The court reasoned that the extension of the stay amounted to a renewal of the license and thus resulted in judicial usurpation of a function delegated solely to the Commission.[51] This, the court held, was prohibited by the separation of powers doctrine. Similarly, in *Indiana Alcoholic Beverage Commission v. Progressive Enterprises, Inc.*,[52] the court held that a preliminary injunction could not be used to permit appellee to operate after the license expiration date. The effect of these holdings is to curtail the utility of temporary injunctive relief as a means of preserving the status quo pending judicial

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[48]289 N.E.2d at 750.

The frustration of the court of appeals in utilizing *Transport Motor II* as a basis for reversing and remanding an award was most artfully expressed by Presiding Judge Buchanan when he stated:

> The message has not been carried to Garcia, even though our Per Curiam opinion in the second *Transport Motor Express* case extensively examined and analyzed the authorities and we thought set up as explicit guidelines as are possible in this area of administrative law.

Bohn Aluminum & Brass Co. v. Kinney, 291 N.E.2d 705, 707 (Ind. Ct. App. 1973).

[49]284 N.E.2d 746 (Ind. 1972).

[50]The plaintiff's license was revoked on October 12, 1971, and Lake Superior Court Judge Giorgi granted plaintiff's motion for a stay pending review on October 14, 1971. After the license expiration date, the Commission moved to have the stay vacated. A judge pro-tempore granted the Commission's motion, but three days later Judge Giorgi vacated the judge pro-tempore's order and reinstated the original stay.

[51]284 N.E.2d at 749.

[52]286 N.E.2d 836 (Ind. 1972).

review of commission determinations.[53] The court, however, left open the question of the applicability of this separation of powers rationale to stays authorized by the Administrative Adjudications Act.[54]

D. Procedure on Appeal

The Indiana Supreme Court, in *Clary v. National Friction Products, Inc.*,[55] clarified an area of substantial confusion concerning the proper application of the Indiana Rules of Trial Procedure to appellate review of administrative agency action. In *Clary* the appellants sought review of negative awards from the Industrial Board by filing timely motions to correct errors pursuant to Trial Rule 59.[56] Upon denial of the motions, the appellants sought, and obtained, review by the court of appeals. Appellee board contended on appeal that the Indiana Workmen's Compensation Act of 1929,[57] which requires that an assignment of error be filed within thirty days from the date of the award,[58] dictated the proper procedure for perfecting an appeal.

The court of appeals accepted the board's contention and dismissed the appeal.[59] The Indiana Supreme Court, after granting a petition to transfer, dismissed the appellant's appeal and held that the proper procedure governing appeals from administrative agency action is controlled by the empowering statutes of the agency, not by the rules of trial procedure.[60] The court stated that

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[53]The legislature amended the governing statute replacing the power to grant stays with the requirements that the court hear an appeal within twenty-four days from the date of filing and enter judgment within seven days after the hearing. IND. CODE § 7-2-3-2 (1972 Supp.).

[54]IND. CODE §§ 4-22-1-1 to -30 (1971).

[55]290 N.E.2d 53 (Ind. 1972).

[56]Indiana Rule of Trial Procedure 59 states in part:

> (c) when motion to correct errors must be filed. A motion to correct errors shall be filed not later than sixty (60) days after the entry of judgment. . . .
>
> (g) . . . [I]n all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefore each error relied upon however and whenever arising up to the time of filing such motion . . . .

[57]IND. CODE §§ 22-3-2-1 to -6-3 (1971).

[58]IND. CODE § 22-3-4-8 (1971).

[59]283 N.E.2d 574 (Ind. Ct. App. 1972).

[60]290 N.E.2d at 56.

all appeals emanating from administrative agency determinations, whether petitioner seeks judicial review or intra-agency review, must be brought in conformity with procedures applicable to the particular reviewing body.[61] Moreover, it is clear that appeals taken from a trial court review of administrative action are governed by the Indiana Rules of Trial Procedure.[62]

E. Standing to Obtain Judicial Review of Administrative Actions

In *Metropolitan Development Commission v. Cullison,*[63] the Indiana Court of Appeals reiterated Indiana's long established rule of standing for persons seeking judicial review of an administrative agency decision. The Metropolitan Development Commission of Marion County and the Department of Metropolitan Development of the City of Indianapolis brought a petition for certiorari, pursuant to an enabling statute,[64] to review a decision of the Board of Zoning Appeals. The trial court granted the Board's motion to dismiss the petition on the grounds that the Commissions were not "person(s) aggrieved" within the meaning of the statute. The court of appeals, in considering the definitional aspects of "aggrieved," relied on the holding in *McFarland v. Pierce,*[65] Indiana's initial case on standing for judicial review. In *McFarland,* the Indiana Supreme Court, citing numerous cases decided in other jurisdictions, stated:

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[61]Cole v. Sheehan Constr. Co., 222 Ind. 274, 53 N.E.2d 172 (1944); Slinkard v. Extruded Alloys, 277 N.E.2d 176 (Ind. Ct. App. 1971).

[62]Indiana State Personnel Bd. v. Wilson, 271 N.E.2d 488 (Ind. 1971); Bradburn v. County Dep't of Pub. Welfare, 266 N.E.2d 805 (Ind. Ct. App. 1971).

[63]277 N.E.2d 905 (Ind. Ct. App. 1972).

[64]IND. CODE § 18-7-2-76 (1971). This section states in part:

> Petition for writ of certiorari from decision.—Every decision of a board of zoning appeals shall be subject to review by certiorari . . . .
>
> Subject to the above limitations, any person aggrieved by a decision of the board of zoning appeals may present to the circuit or superior court of the county in which the premises affected are located a petition duly verified, setting forth that such decision is illegal in whole or in part, and specifying the grounds of the illegality. . . .

From 1965 to 1969, the second paragraph above read:

> Any person, including the executive director of the Metropolitan Planning Department, aggrieved by a decision of the board of zoning appeals may present . . . .

Ch. 434, § 21, [1965] Ind. Acts 1375.

[65]151 Ind. 546, 45 N.E. 706 (1897).

> The word "aggrieved," in the statute refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation. To be "aggrieved" is to have a legal right, the infringement of which by the decree complained of will cause pecuniary injury. The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal.[66]

Since *McFarland,* the Indiana courts have consistently adhered to a standing requirement of economic injury to some legally protected, private interest.[67] Furthermore, it appears that this requirement is to be applied in all cases regardless of whether statutory standing or nonstatutory standing is involved.[68] In light of current trends in the law of administrative standing, it would appear that the private legal right standard is unnecessarily restrictive in its application to contemporary situations and is contrary to the mainstream approach of liberalizing the constitutionally mandated doctrine of standing.[69]

Since 1968,[70] the doctrinal area of standing for judicial re-

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[66]151 Ind. at 548, 45 N.E. at 707 (citations omitted).

[67]Wiedenhoft v. Michigan City, 250 Ind. 327, 236 N.E.2d 40 (1968); Klein v. City of Indianapolis, 248 Ind. 117, 224 N.E.2d 42 (1967); Fidelity Trust Co. v. Downing, 224 Ind. 457, 68 N.E.2d 789 (1946); Terre Haute Gas Corp. v. Johnson, 221 Ind. 499, 45 N.E.2d 484 (1942).

[68]Insurance Comm'n v. Mutual Medical Ins., Inc., 251 Ind. 296, 241 N.E.2d 56 (1968) (proceeding under the Administrative Adjudication and Court Review Acts); Wiedenhoft v. Michigan City, 250 Ind. 327, 236 N.E.2d 40 (1968) (proceeding under the Redevelopment of Cities and Towns Act of 1953); Fadell v. Kovacik, 242 Ind. 610, 181 N.E.2d 228 (1962) (no enabling statute); Campbell-Smith-Ritchie Co. v. Souders, 64 Ind. App. 138, 115 N.E. 354 (1917) (no enabling statute).

[69]Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); DAVIS §§ 22.00-.10 (1970 Supp.); Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450 (1970).

[70]In Flast v. Cohen, 392 U.S. 83 (1968), the United States Supreme Court granted standing for judicial review to federal taxpayers attempting to challenge the constitutionality of a federal statute. The *Flast* case, coupled with Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968), substantially reversed the prior standing requirement of infringement of a "private legal right" as promulgated in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). *See* note 76 *infra. See also* Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601 (1968).

view has experienced a swift revitalization, especially on the federal level.[71] In *Association of Data Processing Service Organizations v. Camp*[72] and *Barlow v. Collins*,[73] the United States Supreme Court promulgated a bifurcated standard for approaching standing questions. Essentially, the Court held that standing for judicial review should be found when the appellant suffers actual injury, either economic or otherwise, as a result of agency action,[74] and the appellant is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[75] The residual effect of *Data Processing/Barlow* has put to rest the "private legal right" concept promulgated in *Perkins v. Lukens Steel Co.*[76] and has opened judicial review to situations in which neither economic deprivation nor purely private legal interests exist.[77] Clearly, public policy supports this public interest standard as potentially aggrieved persons are frequently not cognizant of administrative agency actions and the overall ramifications thereof, nor are they willing to assume steep litigation expenses on an individual basis.[78] These

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[71] *See* note 69 *supra*. *See also* Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972); Note, *Standing to Challenge Administrative Action: The Concept of Personal Stake*, 39 GEO. WASH. L. REV. 570 (1971).

[72] 397 U.S. 150 (1970).

[73] 397 U.S. 159 (1970).

[74] 397 U.S. at 152.

[75] *Id.* at 153.

[76] 310 U.S. 113 (1940). In *Perkins*, the United States Supreme Court stated:

> Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.

Id. at 125.

In *Data Processing/Barlow*, the Court distinguished *Perkins* by stating that the "legal interest" test goes to the merits, while standing presents a threshold question quite apart from the Article III "case" or "controversy" issue. 397 U.S. at 153 & n.1. Apparently, then, the cumulative effect of *Data Processing/Barlow* is to abrogate the *Perkins* "legal interest" test. *See* DAVIS § 22.00-1, at 701 (1970 Supp.).

[77] Sierra Club v. Morton, 405 U.S. 727 (1972); Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970). *See generally* Note, *Public Interest Right to Participate in Federal Administrative Agency Proceedings: Scope and Effect*, 47 IND. L.J. 682 (1972).

[78] Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969) [hereinafter cited as Berger, *Arbitrariness*]; Jaffe, *The Citizen as*

factors, then, would militate against foreclosing judicial access to all but those directly and financially aggrieved. Similarly, due to the often competing functions shared by two or more agencies or boards, one agency is frequently better able to recognize deficiencies in the decision of another agency and is in a more advantageous position, documentarily and financially, to rebut and litigate such a decision.[79]

In *Cullison,* the court, while recognizing the constitutional mandate of access to judicial review for aggrieved persons, refused to expand Indiana's standing doctrine to the parameters outlined by the United States Supreme Court[80] and stated that it has never been judicially held in Indiana "that the Legislature must provide aggrieved persons with an official representative to assert that right for their benefit."[81] In so holding, the court failed to recognize the possible injury to the Commissions resulting from the Board's variance proceeding. Pursuant to the Consolidated First Class Cities and Counties Act,[82] the Division of Planning and Zoning of the Department of Metropolitan Development is required to perform all urban renewal and redevelopment planning functions,[83] as well as all investigative and research duties with respect to living and housing conditions within the city-county boundaries.[84] Similarly, the Metropolitan Development Commission is responsible for a myriad of duties and functions including the promulgation of comprehensive master plans for the socio-economic development of the city-county area,[85] and the formulation and recommendation of zoning ordinances for the effectuation of orderly growth and development.[86] Given these stat-

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Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. PA. L. REV. 1033 (1968) [hereinafter cited as Jaffe, *Citizen*]; Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 HARV. L. REV. 645 (1973) [hereinafter cited as Scott, *Standing*].

[79] *E.g.,* United States *ex rel.* Chapman v. FPC, 345 U.S. 153 (1953).

[80] *See* text accompanying notes 74 & 75 *supra.*

[81] 277 N.E.2d 905, 908 (Ind. Ct. App. 1972).

[82] IND. CODE §§ 18-4-1-1 to -5-4 (1971) (also known as the "Uni-Gov" Act).

[83] *Id.* § 18-4-8-3.

[84] *Id.* § 18-7-11-8(f).

[85] *Id.* §§ 18-7-3-31, -2-36.

[86] *Id.* § 18-7-2-38. This section states in part:

After the certification of a comprehensive (master) plan . . . the metropolitan plan commission shall recommend to the county council

utory duties and powers, it is apparent that deficient zoning variances could impede the Commissions' planning functions and, thereby, threaten the effective development of the city-county polity.

Concomitantly, the possible infringement on the duties and responsibilities statutorily given to the Commissions *arguably* places the Commissions within the zone of interests to be protected by these statutes[87]—namely, efficient and orderly planning and development with a view towards enhancing the social, economic, and aesthetic growth of the city-county area. It would thus appear that the standing requirements enunciated in *Data Processing/Barlow*[88] were met by the appellant Commissions, and the case should have proceeded to the merits. Moreover, it would appear that the court's holding raises a fundamental question concerning the constitutional validity of Indiana's traditional "legal interest" standing requirement. Both the Indiana[89] and the United States[90] Constitutions require that "due process" be accorded all justiciable claims. It is arguable that the *Cullison* court's restrictive definition of "person(s) aggrieved" will effectively thwart good faith claimants, who have suffered actual injury, and prevent the exercise of their right to unfettered access to a judicial forum. At its inception, the "legal interest" test goes to the merits of the case by requiring the appellant to show injury to a legally recognized right or interest.[91] These rights, however, are nar-

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an ordinance or ordinances for zoning or districting of all lands to the end that adequate light, air, convenience of access, and safety from fire, flood and other danger may be secured; . . . that the public health, safety, comfort, morals, convenience and general public welfare may be promoted. . . .

[87]*See* notes 83-86 *supra.*

[88]*See* text accompanying notes 74 & 75 *supra.*

[89]IND CONST. art. 1, § 12:

All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

[90]U.S. CONST. amend. XIV, § 1:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

[91]*See* text accompanying note 76 *supra.*

rowly confined to those involving property, contractual relationships, tortious invasion, and statutorily conferred privilege.[92]

Conversely, the bifurcated standard promulgated in *Data Processing/Barlow* requires, as a prerequisite to conferral of standing, an assertion or allegation of injury to an interest which is *arguably* within a zone of statutorily or constitutionally protected interests.[93] In juxtaposition to the rights recognized in the traditional standing requirement, the zone of protected interests under the *Data Processing/Barlow* requirement is expansive and encompasses " 'aesthetic, conservational, and recreational' as well as economic values."[94]

With respect to the "due process" mandate, it seems clear that the traditional standing requirement is unduly restrictive in both a procedural and substantive manner. The burden of adequately pleading and showing sufficient injury to a few carefully circumscribed substantive rights would tend to constrict judicial access, even to those appellants exhibiting substantial injury. Furthermore, the contemporary standing requirement more closely comports with "due process" judicial access for two reasons. First, the injury complained of must only "arguably" affect some protected interest. Procedurally, this would seem to require only an allegation of manifestly probable injury. Second, the broadening of litigable categories will encompass many substantially aggrieved persons within the ambit of judicial review. Certainly, it appears that the dictates of the due process clause require such contemporary analysis.[95] Lacking such a judicial approach, many "per-

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[92]Tennessee Power Co. v. TVA, 306 U.S. 118, 137-38 (1937). *See also* DAVIS § 22.00-1, at 705-06 (1970 Supp.).

[93]397 U.S. at 153, 164.

[94]*Id* at 154, *citing* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

[95]Although it appears that absolute access to a judicial forum has never been raised to the level of a "due process" mandate, there is considerable authority to the effect that appearances of administrative arbitrariness will trigger a more liberal approach. *E.g.*, Greene v. McElroy, 360 U.S. 474 (1959); Nebbia v. New York, 291 U.S. 502 (1934); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In *Greene,* the Court stated:

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process.

son(s) aggrieved" by administrative agency action will find the judiciary unavailing, and their substantial interests unprotected from arbitrary and capricious action.[96]

F. Workmen's Compensation

In *Frampton v. Indiana Central Gas Co.*,[97] the Indiana Supreme Court created a unique[98] right of action for retaliatory discharges involving workmen's compensation claims. The claimant originally brought an action in circuit court against her employer for her discharge from employment, allegedly in retaliation for filing a workmen's compensation claim. The circuit court dismissed the complaint for failure to state a claim upon which relief could be granted. The court of appeals affirmed.[99] The supreme court, holding that the employee-claimant's allegation of retaliatory discharge was sufficient to establish a judicially cognizable claim, reversed. The court stated that the Workmen's Compensation Act[100] created "a *duty* in the employer to compensate the employees for work-related injuries and a *right* in the employee to receive such compensation."[101] The court concluded that

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360 U.S. at 507.

> Professor Jaffe has proffered the following in a similar vein:
> Where the citizen is demanding his legally prescribed due in the form of money, property or the specific performance of an act, or where he is resisting claims upon his property or his person, it is a *fundamental* tenet of our legal system that there should be a tribunal which will provide a disinterested determination of his claim.

Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034 (1968) (emphasis added). *See* Berger, *Arbitrariness* 980-88. *See generally* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement*, 78 YALE L.J. 816 (1969); Scott, *Standing*.

[96]Sierra Club v. Morton, 405 U.S. 727, 755-56 (1971) (Blackmun, J., dissenting). This danger was cogently recognized by Justice Blackmun:

> Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

Id.

[97]297 N.E.2d 425 (Ind. 1973).

[98]Indiana is the only jurisdiction providing a judicially created right of action for discharge in retaliation for filing a compensation or occupational disease claim.

[99]287 N.E.2d 902 (Ind. Ct. App. 1972).

[100]IND. CODE §§ 22-3-2-1 to -6-3 (1971).

[101]297 N.E.2d at 427.

if the employee is unable to protect his right or to compel the employer's performance of his duty, the public policy underlying the Workmen's Compensation Act would be frustrated.

The court recognized that prior to the *Frampton* case, employers could effectively thwart the employee's exercise of his right to bring a compensation claim by the threat of discharge; the employee, left with a choice between bringing his claim or suffering the loss of his employment, would often choose to continue his employment and thus lose his statutory right to compensation. As a result, the employer could circumvent his obligation.

This landmark decision was founded on three basic premises. First, the Workmen's Compensation Act is designed to provide relief to injured workers, regardless of any fault theories. The policy underlying the Act is to transfer the economic loss due to industrial accidents from the worker to the industry which, in turn, passes it along to the consuming public. Accordingly, the Act must be liberally construed in favor of the employee so as not to vitiate its purposes. Second, equitable principles militate against the judicial toleration of such unconscionable employer action. Third, Indiana Code section 22-3-2-15, which proscribes the employer's use of any "device" in avoidance of his statutory obligations, clearly manifests a legislative policy judgment which the courts should enforce.

In *Lincoln v. Whirlpool Corp.*,[102] the Indiana Court of Appeals refused to sustain a strong challenge to Indiana's long-standing interpretation of the "horseplay doctrine." An employee, while waiting to go on his lunch break, actively engaged in horseplay with a fourteen year old boy. After the employee playfully struck the boy on the leg with his belt, the boy went into a nearby house, returned with a gun, and fatally shot the employee.

Judge Staton held that the employee's death did not "arise out of" his employment and, hence, was not compensable. The court stated that the statutory requirement, that the injury "arise out of" the employment, mandates a risk analysis approach to determine whether the employment "increased the risk" of injury to the employee beyond that to which the general public is exposed. The court's "increased risk" inquiry demanded, as a practical matter, the discovery of some causal connection between the employment and the injury.

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[102]279 N.E.2d 596 (Ind. Ct. App. 1972).

The court concluded that the horseplay in which the decedent had engaged did not constitute any part of the enterprise conducted by his employer and, hence, was not integral to the employment. Thus the *Lincoln* holding stolidly reaffirmed the traditional Indiana rule that a participant in horseplay will be denied compensation except in four situations; when the employer, with knowledge, permits horseplay to continue without attempting to prevent it;[103] when the instrumentalities used in the horseplay are incidental to the work environment;[104] when innocent victims of the horseplay seek recovery;[105] and when horseplay is expected to occur due to the type of work activity and a practice so strong as to become a custom is established, i.e., "air goose" cases.[106]

The horseplay doctrine has recently come under heavy attack by legal writers.[107] In spite of this, the court concluded, without

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[103]Kunkel v. Arnold, 131 Ind. App. 219, 158 N.E.2d 660 (1959).

[104]*In re* Loper, 64 Ind. App. 571, 116 N.E. 324 (1917).

[105]Woodlawn Cemetery Ass'n v. Graham, 273 N.E.2d 546 (Ind. Ct. App. 1971).

[106]*In re* Loper, 64 Ind. App. 571, 116 N.E. 324 (1917).

[107]Horovitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L.J. 1 (1961); Horovitz, *The Litigious Phrase: "Arising Out of Employment,"* 3 NACCA L.J. 15 (1949). Horovitz believes that horseplay is a by-product of industry and is created by the strains and fatigue from human and mechanical impacts when men are put into close association. Since the basic policy of Workmen's Compensation Acts is to provide benefits to victims of industrially-related injuries, without regard to fault, there is no reason to deny benefits to horseplay participants, if the horseplay is a by-product of the industry. Although few jurisdictions have adopted Horovitz's broad rule, Michigan, Mississippi, and Arkansas have favored such an approach and have awarded compensation to horseplay victims who were considered aggressors or active participants. *See*, Southern Cotton Oil Div. v. Childress, 237 Ark. 909, 377 S.W.2d 167 (1964); Crilley v. Ballon, 353 Mich. 303, 91 N.W.2d 493 (1958); Taylor v. Traders & Gen. Ins. Co., 250 Miss. 416, 164 So. 2d 905 (1964).

Professor Larson, in his authoritative treatise on workmen's compensation, states that judicial difficulty with horseplay cases results from confusion between the "arising out of" and "in the course of" employment issues. A. LARSON, WORKMEN'S COMPENSATION § 23.61 (1952). He states that the former is mistakenly thought to be the principal issue. Larson says that whenever a controversy originates from the nature of a course of conduct undertaken by the claimant, the issue concerns a question of "in the course of" employment. But, when the controversy stems from the nature of the source of injury to the claimant, it involves a question of "arising out of" the employment. Thus, if it is determined that the activity (horseplay) itself qualifies as part of the employment and the harm (injury) arises out of that activity, then, logically the harm must arise out of the employment.

comment, that the criticism of the horseplay doctrine was invalid. Consequently, any future attack on the horseplay doctrine in Indiana would appear to necessitate an approach within the traditional framework.

The court of appeals, in *Johnson v. Thomas & Skinner, Inc.*,[108] interpreted the language in Indiana Code section 22-3-3-27 providing for a one year application period for increased permanent partial disability. Prior to this holding, there were conflicting views as to the meaning of the time limitation contained in section 27.

One view was based on the proposition that since section 27 created a right not recognized at common law, the time limitation contained in the statute was "of the essence." Thus, it was reasoned that the employee-claimant must exercise his statutorily created right within the prescribed time period or it would be irretrievably lost. This view has been denominated as the "condition annexed to a statutory right of action" theory.[109] This theory elevates the statutorily prescribed condition to a precedent position with the failure to satisfy the condition eliminating the claimant's right of action. The prevailing view characterized the one year time limitation as a statute of limitations.[110] Cast in this form, the remedy provided by section 27 would be barred, but not the right of action.

In *Johnson* the appellant-employee attempted to file an application for increased disability pursuant to section 27 after the one year time period had expired. He contended that he was mentally incompetent during the one year time period and, therefore, came within the provisions of Indiana Code section 22-3-3-30, which tolls time limitations running against minors or incompetents.

The appellee-employer maintained that section 27 was not a statute of limitations but a "condition annexed to a statutory right" and was unaffected by the tolling provisions of section 30. In short, the employer argued that the employee's right was barred since he failed to bring his action within the stated period.

The Industrial Board, accepting the employer's position dis-

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[108]287 N.E.2d 894 (Ind. Ct. App. 1972).

[109]Wilson v. Betz Corp., 130 Ind. App. 83, 159 N.E.2d 402 (1959); McGinnis v. American Foundry Co., 128 Ind. App. 660, 149 N.E.2d 309 (1958).

[110]*In re* Riggs, 78 Ind. App. 634, 137 N.E. 72 (1922); *In re* Hogan, 75 Ind. App. 53, 129 N.E. 633 (1921).

missed the employee's application.[111] The court of appeals reversed and held that prior case law[112] interpreting section 27 compelled the conclusion that the time proviso constituted a statute of limitations. The court did not discuss the policy reasons behind its decision but the holding is clearly consonant with the prevailing trend toward more liberal construction of the Workmen's Compensation Act to insure the promotion of its humane purposes.

After receiving an award from the Industrial Board for the death of her husband and while still collecting benefits under that award, a widow settled a wrongful death claim with a third party tortfeasor allegedly responsible for her husband's death. A dispute arose between the widow and the employer as to the proper computation of attorney's fees chargeable to the employer under Indiana Code section 22-3-2-13. The statute requires a reimbursed employer to pay his pro rata share of expenses and attorney's fees when recovery is obtained from a third party tortfeasor. In *Indiana State Highway Commission v. White*[113] the Indiana Supreme Court held that the statute requires the fees generated by an attorney in securing reimbursements for an employer or compensation carrier through an action against a third party tortfeasor to be paid by the employer based upon the *gross award,* not upon the amount paid to the employee at the reimbursement date.

The beneficiary contended that the attorney's fees incurred in settling the third party tortfeasor claim should be calculated on the basis of the total amount awarded by the Industrial Board. The employer contended that his ratable portion of the fee expense should be based only on the amount paid to the employee at the date of reimbursement. The court determined that the legislative policy underlying section 13 was to safeguard the employee or his dependents from bearing the burden of legal expenses incident to the recovery of an employer's subrogation claim. The court reasoned that the employee could rest upon his statutory right to an award and collect the entire amount despite the existence of a valid third party claim. The employer or compensation carrier would then be forced to pursue the third party action (subrogation suit) independently and pay the entire amount of attorney's fees. The court concluded that there should be no

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[111]The Industrial Board held that it lacked subject matter jurisdiction due to the claimant's failure to comply with the statute's one year time limitation.

[112]*See* cases cited note 109 *supra.*

[113]291 N.E.2d 550 (Ind. 1973).

reduction in the amount of the employee's award simply because the employee institutes the action rather than the employer.

It would appear that the court's holding would require employers to pay their statutorily prescribed allocation of attorney's fees based on the gross amount of an award *only* when the amount of the recovery from the third party tortfeasor equals or exceeds the amount of the award. If the amount of recovery from the third party tortfeasor is less than that of the gross award, then the ratable basis of the legal expense would be the amount recovered and not the total award made to the employee.[114]

II. Civil Procedure and Jurisdiction

*William F. Harvey**

The following survey of significant cases involving various aspects of civil procedure and jurisdiction in the chronological order of a law suit should be regarded as an overview rather than an extensive analysis.

A. Jurisdiction and Service of Process

In *Neill v. Ridner*,[1] a case of major impact in Indiana, a bastardy proceeding was commenced by plaintiff, seeking support for twins born in 1969. Defendant was eventually served in Kentucky. Defendant argued that there was no personal

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[114]If the total gross award was the basis for computing attorney's fees in all circumstances, it would be possible for the attorney to receive fees in excess of the total third party recovery. For example, assume that the gross award to the employee is $20,000 and the amount recovered in the third party action is $1,000. If the attorney's fees were based upon the gross award, the attorney could receive $5000 under the statutorily prescribed 25% fee in cases in which recovery is received prior to suit. In such a situation the attorney would receive a fee five times greater than the amount of the third party recovery.

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The author wishes to extend his thanks to Bruce Bagni and Lawrence Giddings for their assistance in the preparation of this discussion.

[1]286 N.E.2d 427 (Ind. Ct. App. 1972).

jurisdiction in the Indiana court because a bastardy proceeding was not specifically provided for in the bases of jurisdiction listed under Indiana Rule of Trial Procedure 4.4, because process was served extraterritorially, and because the act complained of was effected prior to the effective date of the trial rules.

The court of appeals, in an opinion by Judge Robertson, held that Trial Rule 4.4(A)(2) applied to the case, in that there was "*no requirement that the act complained of be a tort as it was known at the common law.*"[2] Thus the court gave clear recognition to the proposition that the jurisdiction of a trial court is not to be defined by the concept of "tort" as it is determined in litigation, that is, the "act" committed gives jurisdiction, and the final determination as to its tortious nature will neither create nor divest a court of jurisdiction to hear the dispute.[3]

In the case of *Transcontinental Credit Corp. v. Simkin*,[4] an action was filed in which plaintiff sought to satisfy a personal claim by attaching property owned by the defendant which was located in the State of Indiana. The defendant, however, was not a resident of Indiana. On appeal from a dismissal in the trial court for lack of jurisdiction, the defendant argued that the attachment was an auxiliary action and it was conditioned upon obtaining a valid judgment in the main action. The court of appeals reversed.

The court of appeals held, in effect, that a complaint for recovery of money may be filed together with an affidavit for attachment, and in the proceeding the claim may be adjudicated and satisfied against the property of a nonresident which is held in the State of Indiana. The court said that the following elements must be met:[5] (1) a complaint filed, (2) for the recovery of money, (3) against a nonresident defendant, (4) who owns property in the State of Indiana. The court also stated that when this type of action is filed and there can be no personal service against a nonresident defendant (if the "long arm" statute is inapplicable), then publication pursuant to Trial Rule 4.13 may be sufficient for jurisdiction.

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[2]*Id.* at 429 (emphasis added).

[3]The court also held that extraterritorial service will give personal jurisdiction, as the Trial Rules so contemplate, if the requisite minimum contact and adequate notice are met. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[4]277 N.E.2d 374 (Ind. Ct. App. 1972). *See* Fuentes v. Shevin, 407 U.S. 67 (1972).

[5]IND. CODE § 34-1-11-1 (1971); IND. R. TR. P. 64(B)(1).

The claim in the action, however, could be satisfied only to the extent of the value of the property brought before the court.

Mueller v. Mueller,[6] dealt with a default judgment awarding custody of two children some six years after the original divorce. In seeking the custody award, the petitioner served his former wife with process pursuant to publication, which the appellant ultimately attacked. On appeal, the supreme court held that the trial court had jurisdiction of the action pursuant to Trial Rule 4.4 (A) (7), as well as its continuing jurisdiction over the parties. The court held that Trial Rule 4.4(B) allowed process by personal service, service by certified mail, or service by publication.

The appellant, at the time of the action, had become the resident of another state and there was a showing that there was no forwarding address available. The court sustained the process by publication because it was the best notice possible on the facts of the case. Therefore, the trial court had personal jurisdiction.

In *Morris v. Harris*,[7] a primary question was raised as to whether service of process on the Secretary of State[8] tolled the statute of limitations when service was affected after a nonresident defendant died, but before the statute of limitations expired. An automobile accident occurred on December 7, 1967, between plaintiff and defendant, the latter being an Illinois resident. On October 14, 1969, plaintiff filed suit and directed summons to be served on the Secretary of State of Indiana. But, the defendant died on March 18, 1968. Plaintiff later petitioned the Indiana court to appoint a personal representative for the deceased defendant in June of 1970.

On appeal the court of appeals held that the agency relationship between the Secretary of State and the nonresident operator was terminated by the death of the nonresident. Because the relationship was terminated and constructive agency revoked, service upon the Secretary of State was not effective. Thus the statute of limitations had continued to run.

In the case of *State of Florida ex rel. O'Malley v. Department of Insurance*,[9] the State of Florida entered a proceeding in Marion

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[6]287 N.E.2d 886 (Ind. Ct. App. 1972).

[7]293 N.E.2d 202 (Ind. Ct. App. 1973).

[8]IND. R. TR. P. 4.4(B) (2). Specifically, on serving a nonresident motorist, see IND. CODE § 9-3-2-1 (1971), which provides that if the nonresident dies, service may be made on the executor or administrator of the nonresident's estate.

[9]291 N.E.2d 907 (Ind. Ct. App. 1973).

Superior Court and sought a modification of an order which concerned the distribution of assets of an insurance company. The relief sought was not granted. On appeal, the State of Florida argued that there was no personal jurisdiction over the Florida receiver in that the entry into the Marion County Superior Court was a "special appearance" for purposes of challenging the jurisdiction of that court.

The court of appeals held, in an opinion by Judge Buchanan, that there was no such appearance. The court stated that when one entered an action or commenced an action, then pursuant to Trial Rule 4(A), there was jurisdiction over the person who entered the court. Thus, there was no "special appearance" as the words were used by the State of Florida in the case.

The court also held that subject matter jurisdiction was never waived and was thus properly raised on appeal.[10] The issue concerned whether the State of Indiana had jurisdiction over an intangible thing. The court referred to the *Restatement of Conflicts*[11] and concluded that Indiana did have jurisdiction over the "intangible" (which referred to the liquidation proceeding and a reinsurance contract) because there was a greater association with the State of Indiana in the proceeding concerning the intangible than with any other state.

Duncan v. Binford[12] concerned an attack upon a sheriff's return. The defendant moved to set aside a default judgment on the ground, among others, that there was a mistake and excusable neglect because the evidence showed that the defendant did not receive summons in the action. Defendant also alleged that he had a meritorious defense to the action.

The court of appeals said that when a default has been entered against a person who has not been served with process and who thus has no notice of the action, that person is entitled to have the

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[10]Trial Rule 12(H)(1) provides for waiver of personal jurisdiction if not timely raised. However, lack of subject matter jurisdiction may be raised at any time. *See* Cooper v. Grant County Bd. of Review, 276 N.E.2d 533 (Ind. Ct. App. 1971).

[11]RESTATEMENT OF CONFLICTS OF LAW § 51, Comment a, at 83 (1934), provides in part:

> If any state has jurisdiction over an intangible thing, it is by reason of some special circumstances which connect the intangible thing to the state.

[12]278 N.E.2d 591 (Ind. Ct. App. 1972).

judgment set aside.[13] It further stated that when a sheriff's return shows summons has been served, it is "conclusive" to give the court jurisdiction over the defendant, but the defendant is not estopped from showing that summons was not in fact served upon him, and that he had no knowledge of the action.[14] The court held that the question would be for the trial court to determine, based upon the evidence presented.

In the case of *State ex rel. American Fletcher National Bank & Trust Co. v. Daugherty*,[15] certain stock of an Indiana corporation was before a probate court as part of an estate. Plaintiff claimed that he was entitled to additional compensation because of an employment agreement between himself and the decedent, which agreement might be affected by the vote of the stock in an annual meeting.

The plaintiff therefore brought suit in a Marion County Superior Court to seek an injunction against AFNB to prevent the voting of the stock at any shareholders' meeting. A preliminary injunction was granted and this proceeding was commenced originally in the supreme court as a writ against the Superior Court of Marion County to prohibit its exercise of jurisdiction.

The court said that the legal issue involved concerned the effect upon a court's jurisdiction of another court's acquisition of jurisdiction over the dispute, when the jurisdiction of each court was concurrent. The court held that two courts of concurrent jurisdiction cannot deal with the same subject matter at the same time and that once jurisdiction over the parties and the subject matter has been secured, it is retained to the exclusion of other courts of equal competence until the case is determined.[16] Therefore the court's writ of prohibition was made permanent, because the probate court had full concurrent jurisdiction with the superior court and first acquired judicial power over the estate and the stock in question.

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[13]Dobbins v. McNamara, 113 Ind. 54, 14 N.E. 887 (1888); Ward v. Ward, 117 Ind. App. 225, 71 N.E.2d 131 (1947).

[14]Knowlton v. Smith, 163 Ind. 294, 71 N.E. 895 (1904); Nietert v. Trentman, 104 Ind. 390, 4 N.E. 306 (1885).

[15]283 N.E.2d 526 (Ind. 1972).

[16]State v. Bridwell, 241 Ind. 135, 170 N.E.2d 233 (1960); State *ex rel.* Montgomery v. Superior Court, 238 Ind. 664, 154 N.E.2d 375 (1959); State *ex rel.* Poindexter v. Reeves, 230 Ind. 645, 104 N.E.2d 735 (1952). The court first acquiring jurisdiction retains it so long as it can render complete justice. *See* Demma v. Forbes Lumber Co., 133 Ind. App. 204, 178 N.E.2d 455 (1961).

In *Etherton v. Wyatt,*[17] the court of appeals discussed the question of whether the Boone County Circuit Court would have jurisdiction over a case transferred from the Marion County Superior Court which concerned a money demand against the State of Indiana. The State argued that the Boone County Circuit Court lacked jurisdiction over the subject matter because Indiana Code section 34-4-16-1 required that the Superior Court of Marion County shall try cases involving a money demand against the State of Indiana.

The court of appeals held that that provision was no longer operative in fixing jurisdiction or venue in the type of case before it. Therefore, the Boone County Circuit Court did not lack jurisdiction over the subject matter of the cause. The court reasoned that Trial Rule 75(D) negated the statutory requirement when it specifically stated that no "statute or rule fixing the place of trial shall be deemed a requirement of jurisdiction."[18] Thus, there was jurisdiction in the transferee court.

B. Scope of the Trial Rules

The supreme court in *Jensen v. Indiana & Michigan Electric Co.*,[19] held that, pursuant to Trial Rule 1, the Indiana Rules of Trial Procedure were applicable in full to an eminent domain proceeding and that the parties had the right to exercise discovery as provided and enumerated in the Indiana Trial Rules. The specific holding reversed a trial court decision which granted a motion to deny interrogatories which were filed under Trial Rule 33. The trial court granted the motion on the basis that interrogatories could not be used in an eminent domain proceeding because the trial rules were not applicable thereto.

In the case of *State v. Bridenhager,*[20] the supreme court considered the question, which has often arisen, as to which rule or

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[17]293 N.E.2d 43 (Ind. Ct. App. 1973).

[18]IND. R. TR. P. 75(D); IND. CODE § 34-5-1-1 (1971). In explanation of the rule, Professors Harvey and Townsend wrote:

> [T]he oppressive statute formerly construed as allowing claims against the state only to be litigated in the superior court of Marion County has now been broadened to permit suit in any county of the state subject only to the preferred venue requirement of Rule 75(A) . . . .

4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE § 75.8, at 540 (1971).

[19]277 N.E.2d 589 (Ind. 1972).

[20]279 N.E.2d 794 (Ind. 1972).

statute will control if there is a conflict between the rules of procedure and another statute. The statute in question concerned special notice and extension of time for the Attorney General.[21] The court held that the statutory provision, to the extent that it would make an exception to the general application of Trial Rule 72(D), was abrogated by the rule of procedure.

The court explained that in order to be in conflict with a rule of procedure, it is "required that [a statutory provision] be incompatible to the extent that both could not apply in a given situation. Thus a procedural rule enacted by statute may not operate as an exception to one of our rules having general application."[22] Furthermore, if such an exception were made, it was within the exclusive province of the court to make it.

C. Pleadings and Pretrial Motions

In *Cheathem v. City of Evansville*,[23] the plantiff brought suit seeking relocation expenses and moving expenses equal to other residents. Indiana law did not then allow such payments, and recovery under federal law was prohibited.[24] Defendant filed a motion to dismiss under Trial Rule 12(B)(6), which the trial court sustained, and the court of appeals affirmed.

The court stated that normally the failure to state definitely and clearly a claim will not warrant the granting of a motion to dismiss, that no question of fact will be determined on a motion to dismiss under Trial Rule 12(B)(6), and that the complaint need state only enough to enable the defendant to form a responsive pleading. But, the court explained that the elements necessary to give the defendants notice of the recovery theory cannot be excluded. "The detailed pleading of facts under the old code pleading has been dispensed with but not the disclosure by the claimant of the theory upon which his claim is based."[25] It is not the trial court's duty to search for all possible legal theories which may or may not apply to statements advanced by the plantiff.[26]

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[21] IND. CODE § 4-6-4-1 (1971).

[22] 279 N.E.2d at 796.

[23] 278 N.E.2d 602 (Ind. Ct. App. 1972).

[24] 42 U.S.C. § 1465(e) (1970).

[25] 278 N.E.2d at 605.

[26] Later in 1972, the court of appeals reaffirmed the *Cheathem* holding in City of Hammond v. Board of Zoning Appeals, 284 N.E.2d 119 (Ind. Ct. App.

Subsequently, the Indiana Supreme Court in *State v. Rankin,*[27] succinctly enunciated the requisites of a complaint and the requirements for a Trial Rule 12(B)(6) dismissal. In *Rankin,* an action was brought by the Attorney General of Indiana against several persons who were, allegedly, responsible for property damage at Indiana State University.

The case was dismissed in the trial court pursuant to a motion to dismiss filed under Trial Rule 12(B)(6). The judgment was affirmed in the court of appeals. However, the supreme court held that a complaint is not subject to dismissal "unless it *appears to a certainty* that the plaintiff would not be entitled to relief under *any set of facts.*"[28] The court noted that the rules do not require the complaint to state the elements of a cause of action and that there are other means less drastic than dismissal of the action which can be used to identify the theory or basis for a claim for relief, such as Trial Rules 12(E) and 16(A)(1). The court then cited with express disapproval the opinion found in *Cheathem v. City of Evansville.*[29] Finally, the court indicated that when no evidence has been heard and no affidavit submitted, a Trial Rule 12(B)(6) motion should be granted only when it is clear from the face of the complaint that under no circumstances could relief be granted.

In *American States Insurance Co. v. Williams,*[30] the court of appeals held that when a complaint shows on its face that it was filed subsequent to the running of the statute of limitations, a motion to dismiss under Trial Rule 12(B)(6) is a proper mechanism to attack the complaint and the claim for relief. The court of appeals further explained the function of a Trial Rule 12(B)(6)

1972). In this writer's opinion, the position taken by the court of appeals in both cases presents serious difficulties. First, in a *complaint,* in notice pleading, it should be less necessary to state a "theory" than to state even "facts." (If the product being used fails, was it "negligence" or "breach of warranty?" In the *complaint,* the answer should be, does it really matter?) Secondly, the statement expressed in those two cases is not consistent with another line of cases from the same court. *See, e.g.,* Gladis v. Melloh, 273 N.E.2d 767 (Ind. Ct. App. 1971). The supreme court agreed with this analysis and overruled the *Cheathem* decision. *See* State v. Rankin, 294 N.E.2d 604 (Ind. 1973).

[27]294 N.E.2d 604 (Ind. 1973).

[28]*Id.* at 606. *See also* Sacks v. American Fletcher Nat'l Bank & Trust Co., 279 N.E.2d 807 (Ind. 1972).

[29]278 N.E.2d 602 (Ind. Ct. App. 1972).

[30]278 N.E.2d 295 (Ind. Ct. App. 1972).

motion and its relation to affirmative defenses in *Lacey v. Morgan.*[31] Suit was brought upon an oral contract for the sale of real estate, which appeared, initially, to fall within the Statute of Frauds.[32] The trial court therefore sustained the motion to dismiss, and indicated that various receipts which were filed with the complaint were insufficient to sustain an exception to the statute.

The court of appeals, in reversing, held that the complaint should have been sustained against the attack because "where the complaint shows the plaintiff may be entitled to some relief the complaint is not to be dismissed even though [the plaintiff] is not entitled to the particular relief for which he has asked in his demand for judgment."[33] The court of appeals did not disagree with the trial court, and it did not express an opinion on the merits of the act. It said, simply, that recovery depends upon the plaintiff's ability to carry the evidentiary burden in the proceeding. The court of appeals thus held that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.

Trial Rule 8(C) should be noted at this point. Under that rule, the Statute of Frauds is an affirmative defense, which the defendant usually must set out in his answer. A question which has often arisen is whether, and to what extent, an affirmative defense can be asserted by way of a motion to dismiss under Trial Rule 12 (B)(6). This case held, implicitly, that it is entirely correct to permit the raising of an affirmative defense by way of a Trial Rule 12(B)(6) motion.

In the case of *Salem Bank & Trust Co. v. Whitcomb,*[34] a question arose whether a motion to dismiss, which was filed pursuant to Trial Rule 12(B)(6), should be determined under the requirements of Trial Rule 12(B)(8), which states that under certain circumstances the motion to dismiss shall be treated as and disposed of pursuant to Trial Rule 56. In this case, after filing a motion to dismiss under Trial Rule 12(B)(6), the defendants gave answers to interrogatories propounded by the plaintiff which were duly filed with the court.

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[31]282 N.E.2d 344 (Ind. Ct. App. 1972).

[32]IND. CODE § 32-2-1-1 (1971).

[33]282 N.E.2d at 346.

[34]289 N.E.2d 537 (Ind. Ct. App. 1972).

The court of appeals held that because the interrogatories were filed and answered and made a part of the record of the case *before* the trial judge ruled on the motion to dismiss, and the interrogatories were not excluded from the record of the trial court, the motion to dismiss pursuant to Trial Rule 12(B)(6) should have been treated as if made pursuant to or under Trial Rule 12(B)(8) and thus converted into a motion for summary judgment.[35] The court of appeals also stated that if the interrogatories had not been filed and made a part of the record, the provision of Trial Rule 12(B)(8) would have been inapplicable.

In *Burcham v. Singer*,[36] the defendants, in resisting a motion for summary judgment, filed an affidavit in which they stated that there "is a dispute as to material facts giving rise to this law suit." The trial court granted the motion for summary judgment, and on appeal, the court of appeals held that the affidavit entered by defendants was not sufficient to show a genuine issue of material fact pursuant to Trial Rule 56.[37]

The question as to whether a trial court commits reversible error in refusing to allow the defendant to testify at a summary judgment hearing was answered by the court of appeals in *Deckard v. Mathers*.[38] The court held that pursuant to Trial Rule 56(E), it was within the discretion of the trial judge whether to permit a witness to testify. The court stated there was therefore no abuse of discretion in refusing the testimony.

In *Thompson v. Abbett*,[39] the court of appeals discussed the question whether, in a breach of contract suit, a defendant's claim qualified as a counterclaim or merely an affirmative defense. In addressing this question, the court stated that, consistent with

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[35]The court cited several federal cases with similar problems under Federal Rule of Civil Procedure 12(b)(6), which for all practical purposes is identical to Indiana's motion to dismiss. Generally, federal courts have considered a federal rule 12(b)(6) motion to encompass matters contained in the complaint. *See, e.g.*, Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303 (7th Cir. 1956). Once material outside the pleadings is presented to, and not excluded by, the court, the motion is treated as a motion for summary judgment. *See, e.g.*, Smith v. United States, 362 F.2d 366 (9th Cir. 1966); Allison v. Mackey, 188 F.2d 983 (D.C. Cir. 1951).

[36]277 N.E.2d 814 (Ind. Ct. App. 1972).

[37]Defendants clearly failed to set forth specific facts demonstrating a genuine issue to the court. It is not enough for a pleader to state "there is a genuine issue" without defining that issue.

[38]284 N.E.2d 92 (Ind. Ct. App. 1972).

[39]290 N.E.2d 468 (Ind. Ct. App. 1972).

prior Indiana case law,[40] there are two tests to determine if the material pleaded constituted a counterclaim. The first test, the court said, is whether the defendant is entitled to an affirmative judgment. Secondly, would the defendant be able to continue to trial on his claim in the event the plaintiff dismissed his cause of action?

The court stated that a reading of the defendant's pleading showed that it fulfilled the requirements of a counterclaim and was not merely an affirmative defense. The court noted that the prayer for relief set forth a request for affirmative relief in the form of a money judgment. Additionally, the counterclaim passed all tests for stating an independent cause of action.

The court of appeals gave a significant interpretation to the Trial Rules which touch upon counterclaims in *Commercial Credit Corp. v. Miller.*[41] In that case the plaintiff, Commercial Credit, brought suit for the immediate possession of an automobile, and defendants filed a counterclaim. The counterclaim was captioned "Cross-complaint," and was not, therefore, a "denominated counterclaim" in the language of Trial Rule 7(A)(2). Nevertheless, the court held that, pursuant to Trial Rule 8(D), the plaintiff was in default for failing to file a reply to the counterclaim. The court stated that: "we note that [defendants] have captioned their counterclaim a 'Cross-complaint.' However, under the current Rules of Procedure, the court is to treat the motions and pleadings for what they actually are, irregardless of how they are captioned."[42]

It should be observed that the real issue is not how a court should treat a pleading or a document, but what is the effect to be visited upon a party for failing to reply. In short, it was not the trial court which defaulted, but the party; hence how a court treats a pleading within its scope of judicial flexibility, is quite a different matter than how a party must respond. In any event, a rule of practice would seem to derive from this case: *always file a reply.*

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[40]The court cited State *ex rel.* Ziffrin v. Superior Court, 242 Ind. 246, 177 N.E.2d 898 (1961), as establishing the two tests for determining a counterclaim.

[41]280 N.E.2d 856 (Ind. Ct. App. 1972).

[42]*Id.* at 860 n.1. *See* De Vito v. Hoffman, 199 F.2d 468 (D.C. Cir. 1952) (a pleading denominated a "supplemental complaint" was treated as a counterclaim).

In *Aldon Builders, Inc. v. Kurland,*[43] the trial court concluded, after specially finding facts, that among the parties there was a rescission of their agreement. The appellant claimed error. The court of appeals agreed because the record failed to disclose that the issue of a rescission was ever raised or litigated. The court of appeals held that, consistent with Trial Rule 15(B), when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated as if they were raised by the pleadings. However, a mere failure to object is not the only requirement necessary to raise an issue by implication. Both parties must litigate the new issue, and the evidence which supports the presence of that new issue must not be adduced by asking questions about an issue already pleaded. In that way, the court indicated, a party will be given some notice that an issue not pleaded, or raised in a pretrial order, is before the court.[44]

In the case of *Hawkins v. Kourlias,*[45] the plantiff brought an action for ejectment and defendant filed a counterclaim. On appeal the plaintiff contended that the jury verdict and the judgment were not within the scope of the pleadings for the evidence submitted. The court of appeals disagreed and pointed out that at the conclusion of the defendant's evidence, defense counsel made a motion to amend all pleadings to conform with the evidence. The record showed that all pleadings were amended to conform to the evidence, and thus the court found no error in the point raised.

Trial Rule 15 received further interpretation in *Ryser v. Gatchel,*[46] which involved the incorrect naming and designation of a party. The case arose on appeal from a summary judgment order, and during the course of the opinion the court discussed the "relation back doctrine" of Trial Rule 15(C) and the method by which the question of whether or not a defendant had or should have had notice of the filing of an action could have been raised, although it was not so raised in the trial court.

The court stated that the plaintiff should set forth sufficient facts to show whether the originally misnamed defendant had

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[43]284 N.E.2d 826 (Ind. Ct. App. 1972).

[44]*Id.* at 832. The court held that notice is particularly important when "the new issue is not unequivocally clearly the evidence being submitted." *Id. See* Hacker v. Review Bd., 271 N.E.2d 191 (Ind. Ct. App. 1971).

[45]282 N.E.2d 551 (Ind. Ct. App. 1972).

[46]278 N.E.2d 320 (Ind. Ct. App. 1972).

"received such notice of the institution of the action" and whether defendant "knew or should have known . . . the action would have been brought against him"[47] so as to raise the question pursuant to Trial Rule 15(C). The court said, however, that such was not the situation in the case on appeal, and therefore, the court did not determine the question.

The supreme court provided significant guidelines regarding the usage of the "Lazy Judge Rule" (Trial Rule 53.1) in the case of *Lies v. Ortho Pharmaceutical Corp.*[48] In two separate holdings the court established several principles. First, the procedure outlined in Trial Rule 53.1 is the appropriate vehicle for correcting the deficiency of failure to rule a posttrial motion. The court said that Trial Rule 53.1 should be read in conjunction with Trial Rule 63(A). Second, the filing of briefs or memoranda relative to motions on file will not extend the time permitted a trial judge under Trial Rule 53.1(A) for ruling upon the motion.[49] If additional time is required for briefing and consideration in the trial court, counsel should agree pursuant to the Trial Rule and the ruling date should extend to the date set pursuant to the order book entry which is made in accordance with the agreement. Otherwise, the supreme court said, the trial court has no alternative but to rule even without full consideration of the briefs. Alternatively, the trial court could apply to the supreme court for an extension of time pursuant to the rule. Third, when a praecipe is filed pursuant to this rule, it may be withdrawn by the party who filed it, subject, of course, to a praecipe being filed by another party; and once notice is filed in the supreme court it may be quashed only by a motion filed in the supreme court. Finally, the court held that the trial court may not adopt a rule which is inconsistent with these rules or which is an impingement thereon. The court referred to Rule 6 of the Circuit and Superior Courts of Marion County, which generally stated that counsel shall give five days' written notice prior to the expiration of the thirty-day period found in Trial Rule 53.1.[50] Relying on

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[47]IND. R. TR. P. 15(C).

[48]284 N.E.2d 792 (Ind.), *petition for withdrawal of opinion denied*, 286 N.E.2d 170 (Ind. 1972).

[49]Whenever the judge shall delay a ruling beyond thirty days, the clerk shall, upon the filing of a praecipe by an interested party, give written notice to the judge and the supreme court of the withdrawal of the motion. The withdrawal and disqualification are effective as of the time of the filing of the praecipe. IND. R. TR. P. 53.1(B).

[50]Lies v. Ortho Pharmaceutical Corp., 286 N.E.2d 170, 172 (Ind. 1972).

Trial Rule 81,[51] the supreme court stated that that trial court rule was invalid because it was inconsistent with the Trial Rules.

Rolf v. Rolf[52] also involved Trial Rule 53.1. In this case, the defendant in the action filed a praecipe to withdraw the action from the court because ninety-two days had elapsed after submission of the issues and a motion. The trial judge stated in an affidavit that he was in the process of preparing both findings of fact and conclusions of law. The trial court also stated that prior to the time the praecipe was filed he had entered a judgment for the plaintiff on the bench docket.

The supreme court held that an entry of judgment on the bench docket would not be a sufficient entry to satisfy this rule, that the entry which should have been effected was upon the order book, and that, therefore, the praecipe should have been considered as timely filed because there was in fact no order book entry. The court stated specifically that when a party is acting without notice that a judgment is forthcoming and when there is nothing in the clerk's office (in the order book), or in the "work in process" which would indicate a judgment or ruling had been entered, the praecipe should be deemed effective when filed. The court stated that that procedure would be fairer to all parties than any other.[53]

D. Pretrial Procedures and Discovery

In the case of *Martin v. Grutka*,[54] the trial court entered a summary judgment *at a pretrial conference.* On appeal, the appellants argued, in part, that there was inadequate notice of the summary judgment proceeding and that the pretrial conference was not a proper place for it. The court of appeals held that even if there were no prior notice (in fact the motion for summary judgment was made over four months before it was considered at the pretrial conference), and even without actual notice that the summary judgment would be considered at the pretrial conference, the appellants must be deemed to have had constructive

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[51]Trial Rule 81 specifically allows local courts to make and amend local rules which are not inconsistent with the Trial Rules.

[52]287 N.E.2d 865 (Ind. 1973).

[53]The court held that a party will not be required to check the judge's bench docket and that the timeliness of the praecipe should be determined from the records maintained in the clerk's office. *Id.* at 867.

[54]278 N.E.2d 586 (Ind. Ct. App. 1972).

notice because of Trial Rule 16(A), which provides in part that the trial court may consider any matter at the pretrial conference which may aid in the disposition of the action.

The court of appeals in *Troxel v. Otto*,[55] held that an isolated, inadvertent remark or statement by counsel, even though prejudicial, may not constitute reversible error, but that a persistent attempt to influence a jury by irrelevant and prejudicial comments, especially after the trial court has ruled such conduct improper, is misconduct causing reversal. In this case there was repeated reference to another accident which killed the deceased. The court also indicated that alert counsel may protect himself against possible misconduct by means of a pretrial order determining admissibility whenever trial preparation discloses evidence of a highly prejudicial nature which may or may not be admissible.[56] Here, the court implicitly recognized a procedure known as a *motion in limine.*

In the case of *Burris v. Silhavy*,[57] the court of appeals explicitly recognized as a part of Indiana civil practice the motion in limine. The case in which this arose was a personal injury action, which was tried a second time. Prior to the second trial, the defendants filed a motion in limine in which they sought a protective order concerning reference to certain evidence in the case by the plaintiffs or plaintiffs' counsel. The order was granted and trial proceeded before a jury.

On appeal the plaintiff-appellant raised the question whether Indiana would recognize the use of a motion in limine. The court stated that the use of a motion in limine emanates from the inherent power of the trial court to exclude or admit evidence in the furtherance of its obligation to administer justice in the case. Thus the court said motions in limine are a part of Indiana practice although not specifically recognized by either statutory or procedural rules. Concerning the motion, the court stated that it is used either before or after the beginning of a jury trial as a protective order prejudicial questions and statements. The purpose in filing the motion is either to suppress evidence or to instruct opposing counsel not to offer it in order to prevent prejudicial questions and statements in the presence of a jury.

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[55]287 N.E.2d 791 (Ind. Ct. App. 1972).

[56]*See* IND. R. TR. P. 16(A),(J).

[57]293 N.E.2d 794 (Ind. Ct. App. 1973).

The supreme court in *Sacks v. American Fletcher National Bank & Trust Co.*,[58] had before it on a motion to transfer the question whether or not a motion to dismiss should be automatically granted if an indispensable party was absent in the litigation. The defendants moved to dismiss a complaint, which alleged in part a derivative action, on the grounds that the receiver of the corporation involved had not been made a party, leave of the receivership court having been sought and denied, and the receiver is an indispensable party to the stockholder's derivative action.

The supreme court, citing *Ross v. Bernhard*,[59] held that a corporation is a necessary party in a derivative suit, and that if the corporation is in the hands of a receiver at the time, then the receiver is a necessary party, in that he represents the corporation. Further, as a condition precedent, leave to sue the receiver must be obtained from the receivership court. However, the court held that the absence of a party called indispensable does not mean that the case shall automatically be dismissed. The court also stated that this alone is *not* sufficient reason to sustain a motion to dismiss. Rather, the trial court must determine whether it is feasible to join the party, and if not, dismissal would not necessarily follow.

Indiana Trial Rule 32(A) (3) (c), provides, in part, that a deposition of a witness, whether or not a party, may be used for any purpose by a party, if the trial court finds that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment.[60] The court of appeals discussed this provision in *Schoeff v. McIntire*.[61] In this case the appellee-plaintiff brought suit for injuries sustained while riding in a friend's automobile. Prior to trial, the appellant's counsel took the plaintiff's deposition, all of which was offered at trial and admitted over objection. The objection was on the ground, among others, that the plaintiff's deposition could not be used in that the basis for use was not shown. There was no reason that plaintiff could not come to court,

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[58]279 N.E.2d 807 (Ind. 1972).

[59]396 U.S. 531 (1971). The corporation is an indispensible party, and failure to make the corporation a party leaves the stockholder without a cause of action and the court without jurisdiction. 13 W. FLETCHER, PRIVATE CORPORATIONS § 5977, at 456 (perm. rev. ed. 1970).

[60]Testimony by deposition is less desirable than actual oral testimony and should be used only when the nonparty witness is not available or when exceptional circumstances necessitate its use. G.E.J. Corp. v. Uranium Aire, Inc., 311 F.2d 749, 755 (9th Cir. 1962).

[61]287 N.E.2d 369 (Ind. Ct. App. 1972).

defendant argued, if the plaintiff could go downtown and otherwise perform daily tasks.

The trial court admitted the depostion. The plaintiff presented the testimony, on the point, of a doctor who said that plaintiff suffered a congestive heart failure and that in his judgment to appear and testify would be injurious to her health. The court of appeals held that the record was sufficient to justify the trial court's finding that the witness was unable to attend for reasons of sickness and infirmity. Thus the deposition was fully admissible.

In the case of *Wynder v. Lonergan,*[62] a personal injury action, the defendant took the deposition of the plaintiff's doctor, parts of which were offered into evidence by the plaintiffs. The trial court excluded parts of the deposition because it constituted hearsay evidence, even though there was no objection by the defendant at the time the deposition was taken. The court of appeals held[63] that, contrary to the plaintiff's argument, there was no waiver by the defendant in failing to object at the deposition. The court held that Trial Rule 32(B) is qualified and limited by Trial Rule 32(D)(3), in that the latter provision sets out eight grounds for objection,[64] and objection to inadmissible testimony is not waived by failing to object at the deposition unless the objection falls within one of the eight categories, which was not the case here.

The supreme court in *Chustak v. Northern Indiana Public Service Co.,*[65] discussed Trial Rule 34 and the possibilities of waiving the rights therein. In that case, a proceeding was commenced to appropriate a right-of-way for electrical transmission lines. The defendant in the action filed a request to produce documents pursuant to Trial Rule 34. Thereafter, the defendant filed an objection to the eminent domain proceeding and a motion to produce the documents previously designated. The parties pro-

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[62]286 N.E.2d 413 (Ind. Ct. App. 1972).

[63]The court also held that, pursuant to Trial Rule 32(C), a party does not make a witness "his own" by taking his deposition.

[64]Trial Rule 32(D)(3)(a)-(c) requires reasonable objection to: (1) competency of a witness, (2) competency, relevancy, or materiality of testimony, (3) manner of taking depositions, (4) form of questions and answers, (5) errors in oath or affirmation, (6) conduct of the parties, (7) other form defects, and (8) form of written questions submitted under Trial Rule 31.

[65]288 N.E.2d 149 (Ind. 1972), *noted in* 6 IND. L. REV. 781 (1973).

ceeded to an evidentiary hearing upon the objection at the conclusion of which the court, without ruling on the motion to produce, ordered the appropriation and appointed appraisers.

The supreme court stated that it could not assume that the trial court overruled the written motion to produce, because no ruling appeared. However, the court held that by proceeding without protest and without a ruling, the defendant waived any error that might have been averted. The court then extensively discussed Trial Rule 34 and pointed out that the defendants were seeking discovery of the plantiff's computations concerning the width of the desired right-of-way. Since the computations were not made in preparation for litigation, but rather in the ordinary course of the utility company's business, the discovery was controlled by Trial Rule 34, and pursuant to that rule the computations were discoverable.[66]

The court of appeals, in *Hiatt v. Yergin*,[67] established the definitive guidelines for trial by jury in Indiana. In this case, plaintiff filed suit asking for specific performance as well as damages and made a general demand for trial by jury. That is, plaintiff demanded trial by jury on issues formed on the pleadings in the case.

The court stated that the primary issue[68] was whether there was a right to trial by jury in causes in which one or more of the issues of fact are of exclusive equitable jurisdiction and others are not. The basic problem in the case was whether, under the new rules, equity, having once acquired jurisdiction in a dispute, would also litigate the legal issues raised in the case. Thus the court was confronted with the question of whether the federal cases of *Beacon Theaters, Inc. v. Westover*,[69] and *Dairy Queen, Inc. v. Wood*,[70] would be used to expand the right of trial by jury when it did not exist

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[66]The court also stated that a party may not wait until the last possible moment to act and then, in reliance upon the rules of discovery, expect the court to halt the proceedings in order to accommodate that party's motion. *Id.* at 154.

[67]284 N.E.2d 834 (Ind. Ct. App. 1972). It is this writer's opinion that *Hiatt* will become a leading case on the subject of trial by jury under the merged system of law and equity and notice pleading.

[68]The court, after extensively reviewing Indiana statutory and case law, also held that Trial Rule 38(A) governs both Trial Rules 38(C) and 39 (A) (2).

[69]359 U.S. 500 (1959).

[70]369 U.S. 469 (1962).

at common law. Those United States Supreme Court cases held generally, that when legal issues are raised with equitable issues, the legal issues shall be tried first by a jury. This means that a finding by the jury would be binding upon the court in a subsequent dispute at equity.

The court of appeals rejected those decisions for the reason that the decisions were not pursuasive even in the federal judicial system and were contrary to both the common law and Indiana common law.[71] Therefore, the court stated that because issues at law would not automatically be elevated for trial purposes over issues in equity, the question was how, given merged systems, is a trial court to determine whether or not there is a right to trial by jury. The court answered this question in the following manner: "Where the pleadings are of the notice variety, the trial court must necessarily turn to the totality of the proceedings before it to ascertain whether the claim of the party seeking a jury trial is essentially equitable or legal in nature."[72] The court stated that Trial Rule 16(A)(1) provides an excellent opportunity for the trial court to develop the issues by requiring the attorneys to participate in a pretrial conference for that purpose.[73]

E. Trial and Judgment

The court of appeals in *McClure v. Austin*[74] articulated the proper standard of appellate review of cases resulting in a judgment on the evidence (directed verdict). The court held that a judgment on the evidence entered by a trial court may be affirmed if there is a total absence of evidence or reasonable inferences therefrom in favor of the plaintiff upon the issues. If there is *any* evidence or reasonable inferences drawn therefrom which might support the plaintiff, then the judgment on the evidence is improper.

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[71]The court of appeals reasoned that since the seventh amendment to the United States Constitution applies only to civil trials in federal courts, the states may develop their own body of law concerning the right to trial by jury in civil matters. 284 N.E.2d at 849.

[72]*Id.* at 847.

[73]IND. R. TR. P. 16(A)(1) provides that, except in criminal actions, the court may, at its discretion, and shall, upon the motion of any party, direct the attorney for the parties to participate in a conference before the court to consider simplification of the issues.

[74]283 N.E.2d 783 (Ind. Ct. App. 1973).

In the case of *Estes v. Hancock County Bank,*[75] the plaintiff brought suit against the defendant bank and its president alleging the tort of malicious prosecution. The jury returned a verdict against the bank and in favor of the bank president. Thereafter the plaintiff and the bank each made a motion for a judgment on the evidence, but upon different grounds.

The supreme court held that the effect of both parties' asking for a judgment on the evidence pursuant to Trial Rule 50 was to withdraw the case from the jury and to submit the case to the court for its determination. The court stated that the case would then be considered as if it had been tried without a jury. The court also held that because parties failed (and neither party so moved) to ask for a new trial, but asked instead for a final determination by the trial court, the scope of review would be limited to a consideration of the trial court's judgment as entered. By implication, the court stated that the failure to ask specifically for a new trial would foreclose granting thereof in the court of appeals. The case would seem to be contrary to the language found in Trial Rule 50(C).

Trial Rule 52(A) was judicially clarified by the court of appeals in two 1972 decisions. In *Colonial Life & Accident Insurance Co. v. Newman,*[76] the appellant argued that pursuant to Trial Rule 52(A), a trial court should be required to set out its reasoning, showing how the facts found are related to the conclusions so to render an understanding of the final judgment. The court of appeals held, consistent with the language of the rule, that the trial judge is not so mandated.

The rule was further delineated in *In Re Adoption of Graft,*[77] wherein the question was raised whether a trial court, when trial is to the court, must in *all* cases enter findings of fact and render conclusions of law thereon pursuant to Trial Rule 52(A). The court of appeals held that the trial court is not required to make special findings of fact unless requested pursuant to the rule. Furthermore, the rule does not require that the trial court make conclusions of law. Specifically, the rule states that upon its own motion, or the written request of any party filed with the trial court prior to the admission of evidence, the court shall find

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[75]289 N.E.2d 728 (Ind. 1972).

[76]284 N.E.2d 137 (Ind. Ct. App. 1972).

[77]288 N.E.2d 274 (Ind. Ct. App. 1972).

specially and state its conclusions thereon.[78] The court stated that a waiver was entirely possible unless the request was made to the trial court before the admission of evidence in the case.

In the case of *Buell v. Budget Rent-A-Car, Inc.*,[79] a question was raised on appeal whether the judgment entered was improper because it was inconsistent with the pleadings in the case. That is, the judgment entered was for a money judgment whereas the complaint was solely for declaratory relief to determine whether taxes were due and if so to determine the method used for collection. The treasurer of Marion County argued that the judgment did not conform to the pleadings. The court of appeals answered that a plaintiff is not limited to a recovery or a theory of recovery which is designated in his complaint.[80]

In *Bloom's Lumber & Crating, Inc. v. James*,[81] the supreme court held that a ruling of a trial court in a case which was tried to the court, which ruling shall constitute the findings of fact and judgment entered, must be entered of record to be effective. The court said that the trial court speaks only through its official records, the primary record being its order book. Litigants are charged with notice of what the order book contains.

The court also said that the absence of an order book entry can be corrected nunc pro tunc,[82] but that such an entry does not contemplate an entirely new entry when made. That is, a

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[78]The fact that the trial court is not required by Trial Rule 52(A) to make special findings of fact, unless requested, presents no change from prior procedural law. *Compare* IND. R. TR. P. 52(A) *with* ch. 38, § 394, [1881] Ind. Acts. Spec. Sess. 240 (repealed 1970). *See* Vogel v. Harlan, 277 N.E.2d 173 (Ind. Ct. App. 1971); Arnett v. Helvie, 267 N.E.2d 864 (Ind. Ct. App. 1971); Langford v. Anderson Banking Co., 258 N.E.2d 60 (Ind. Ct. App. 1970). There is, however, a difference between Trial Rule 52(A) and the corresponding federal rule 52(a). The federal rule requires special findings of fact and conclusions of law in all actions tried to the court without the intervention of a jury.

[79]277 N.E.2d 798 (Ind. Ct. App. 1972).

[80]The rule that "plaintiff must recover on the theory of his complaint or not at all" was abrogated in Indiana in Morrison's S. Plaza Corp. v. Southern Plaza, Inc., 252 Ind. 109, 246 N.E.2d 191 (1969). Plaintiff is bound by the allegations in his complaint only in that he may not, over objection, prove facts which are irrelevant to issues raised in the pleadings. *See* Wyler v. Lilly Varnish Co., 146 Ind. App. 91, 252 N.E.2d 824 (1969).

[81]285 N.E.2d 822 (Ind. 1972).

[82]*See* Leonard v. Broughton, 120 Ind. 536, 22 N.E. 731 (1889); Chrissom v. Barbour, 100 Ind. 1 (1885).

written memorial or entry must exist in order to establish a basis for effecting a correction.[83]

The issue arose when the defendants' proceeded pursuant to Trial Rule 53.2 to remove the trial judge after the case was tried, because it was under advisement more than 90 days prior to the filing of a praecipe with the clerk for removal of the trial judge and the appointment of a special judge. The chronological sequence was that the trial court exceeded the ninety day period for having a tried case under advisement and on the 107th day the trial court decided the case but made no entry. Then, fourteen days later, the court notified the plaintiff of its decision and entered it upon its bench docket. Thereafter, the defendant requested that the case be withdrawn, as stated above. After that request was made, the trial court stated to the clerk that judgment had been rendered prior to the filing of the praecipe and proceeded to enter a judgment nunc pro tunc, back dated to the 107th day.[84]

The issue as to whether a verdict can be impeached by a juror's affidavit was before the court of appeals in *Anderson v. Taylor*.[85] The court considered the question whether jurors' affidavits stating that the jury, specifically eight members thereof did not understand the meaning of the word "wanton" and revealing that they had asked the bailiff for a dictionary, would be reviewed to impeach the verdict. The court held that the law for many years has been settled that a juror can not impeach his verdict by an affidavit.[86]

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[83]The court continued, "*But entries may not be entered nunc pro tunc from thin air.*" 285 N.E.2d at 825. *See* Cook v. State, 219 Ind. 234, 37 N.E.2d 63 (1941).

[84]It was against this background that the supreme court developed its holdings. It was further asserted that counsel did not, prior to the filing of his praecipe, indicate to the court that he desired rulings in the pending case. The supreme court stated that he was not required to do so. *See* Lies v. Ortho Pharmaceutical Corp., 284 N.E.2d 792 (Ind.), *petition for withdrawal of opinion denied*, 286 N.E.2d 170 (Ind. 1972), *noted at* p. 36 *supra*.

[85]289 N.E.2d 781 (Ind. Ct. App. 1972).

[86]For example, the Indiana Supreme Court had previously stated:

> A jury's verdict may not be impeached by testimony of the jurors. Even the slightest consideration of such practice under these circumstances would create an intolerable situation and no jury verdict would ever be lasting or conclusive.

Wilson v. State, 253 Ind. 585, 591, 255 N.E.2d 817, 821 (1970). *See also* Spannuth v. Cleveland, C.C. & St. L. Ry., 196 Ind. 379, 148 N.E.2d 410 (1925); Mitchell v. Parks, 26 Ind. 354 (1866); Jessop v. Werner Transp. Co., 147 Ind. App. 408, 261 N.E.2d 598 (1970).

F. Appeal

In the case of *City of Mishawaka v. Stewart,*[87] an appeal was taken to a circuit court from a determination by the Board of Public Works and Safety of the City of Mishawaka. After that court's decision was rendered, an appeal was taken to the court of appeals. In the court of appeals, the question was raised whether a motion to correct error filed in the trial court was (a) a condition precedent to the appeal, and (b) the correct motion, in view of the proceeding, to file in trial court. The court of appeals held that a motion pursuant to Trial Rule 59(G) was correct and that it was a condition precedent to perfecting an appeal from the circuit court.[88]

In the case of *Ver Hulst v. Hoffman,*[89] the plaintiff timely moved under Trial Rule 59 to correct error. After the sixty-day period expired, plaintiff moved to amend the motion to correct errors. This point was raised on appeal, and the court of appeals held, in an opinion by Judge Sharp, that the plaintiff-appellant could not amend the motion to correct error because the sixty-day period had run.[90] Conversely, the court said the motion could be amended or supplemented within the sixty-day period.

In *Brennan v. National Bank & Trust Co.,*[91] a motion to dismiss the appeal was filed because appellant failed to file a praecipe designating what was to be included in the record of proceedings, which was to be filed within thirty days after the trial court's ruling on the motion to correct error. The appellant argued that the purpose of Appellate Rule 2(A) was to assure that appeals shall be submitted within ninety days after the motion to correct error, and that in this case the appeal was submitted within ninety days, with no extension of time requested. Thus, appellant said that he should not be penalized because the praecipe

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[87]291 N.E.2d 900 (Ind. Ct. App. 1973).

[88]Bradburn v. County Dep't of Pub. Welfare, 266 N.E.2d 805 (Ind. Ct. App. 1971); Lows v. Warfield, 259 N.E.2d 107 (Ind. Ct. App. 1970).

[89]286 N.E.2d 214 (Ind. Ct. App. 1972).

[90]The sixty-day period allowed by Trial Rule 59(C) is mandatory, as was the thirty-day period under the prior rules. *Compare* Brunner v. Terman, 275 N.E.2d 553 (Ind. Ct. App. 1971), *with* Smith v. Spitznogle, 142 Ind. App. 575, 236 N.E.2d 184 (1969). As to the prior rule regarding amended or supplemental motions filed after the expiration date, see Beck v. State, 244 Ind. 237, 170 N.E.2d 661 (1960); Smith v. First Nat'l Bank, 104 Ind. App. 299, 11 N.E.2d 58 (1937).

[91]288 N.E.2d 573 (Ind. Ct. App. 1972).

was not filed within thirty days after ruling on the motion to correct error. The court of appeals held that the thirty days praecipe rule was mandatory and the failure to file meant that the right of appeal was forfeited. The court therefore dismissed the appeal.

In *Miles v. State,*[92] the court of appeals affirmed a conviction in a case in which, on appeal, the error alleged was the insufficiency of the evidence. It was further alleged that there was no transcript of the evidence included in the record and no approved statement of the evidence pursuant to Appellate Rule 7.2(A)(3)(c). The court of appeals held that the conviction must be affirmed because when the only question raised was sufficiency of evidence, it was imperative that transcript of the evidence and an approved statement of the evidence be provided.[93] Otherwise, the court said that the only alternative would be to *guess* whether the trial court should be reversed or sustained. Because these procedures were not followed, the conviction was affirmed.

Bell v. Wabash Valley Trust Co.[94] held that because a praecipe was not filed, pursuant to Appellate Rule 2, within thirty days after the overruling of a motion to correct error, the appeal was not effective. The suit was originally filed to terminate a trust, which eventually resulted in a trustees' statement with a judgment rendered thereon. That judgment was subject to the right of appeal. The appellants filed a motion to correct error which was granted in part and overruled in part. No praecipe was filed until approximately sixty-eight days after ruling upon the motion to correct error. The court of appeals stated that because of Appellate Rule 2(A) requiring a praecipe within thirty days, the appeal must be dismissed pursuant to the appellee's motion.

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[92]284 N.E.2d 551 (Ind. Ct. App. 1972).

[93]Under Appellate Rule 7.2, the appellant must present a sufficient record to allow a meaningful review. Johnson v. State, 283 N.E.2d 532 (Ind. 1972); Burns v. State, 255 Ind. 1, 260 N.E.2d 559 (1970). If a transcript is unavailable, the proper procedure is to obtain a factual statement of the evidence pursuant to Appellate Rule 7(A)(3)(c). Quinn v. State, 281 N.E.2d 478 (Ind. 1972). If these procedures are not followed and appellant challenges his conviction on sufficiency of the evidence, the appeal must be dismissed. When no evidence is placed on the record, no question is presented on appeal. Calvert v. State, 251 Ind. 119, 239 N.E.2d 697 (1968); Short v. State, 234 Ind. 17, 122 N.E.2d 82 (1954); Messersmith v. State, 217 Ind. 132, 26 N.E.2d 908 (1940).

[94]290 N.E.2d 454 (Ind. Ct. App. 1972).

In the case of *In re Estate of Moore*,[95] the court of appeals held that an oral request to the court reporter to prepare a transcript did not comply with the requirement of Appellate Rule 2(A) that an appeal be initiated by filing a praecipe with the clerk of the trial court. The rule further requires that a copy of a praecipe shall be served promptly upon the opposing parties. The court therefore stated that the rule required that a praecipe be a written document filed with the clerk. Thus, the case was dismissed, although all other papers and briefs were timely filed.

The opinion in *Softwater Utilities, Inc. v. LeFevre*,[96] contained language which should be highlighted for the benefit of all attorneys in Indiana:

> In the recent case of In re Estate of Moore (1973), Ind. App., 291 N.E. 2d 566, the trial judge changed the record to show the praecipe filed several days before it actually was filed. In this case, the trial judge changed the record to show that the Motion to Correct Errors was overruled several days later than it actually was overruled. In both cases, the purpose of changing a record appears to have been the same, namely, to circumvent the application of Rule AP. 2(A).[97]

In the *Softwater Utilities* case, the appellants stated that the notice of the overruling of the motion to correct error was never received, although that fact was disputed.

The effect of the court's opinion is that regardless of whether the notice is received by a losing party, pursuant to Trial Rule 72(D) and Appellate Rule 2(A), the right to appeal will be forfeited unless the praecipe is filed within thirty days after the *ruling* on the motion to correct error. Thus, time does not run from the time when notice of that ruling is received by the party adversely affected.

In the case of *Dzur v. Northern Indiana Public Service Co.*,[98] the supreme court considered Trial Rule 62(D) and Appellate Rule 6(B), in connection with an appeal taken from an interlocutory order. The appellee filed a motion to dismiss or affirm in which it stated, in part, that the appeal should be dismissed because

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[95]291 N.E.2d 566 (Ind. Ct. App. 1973).

[96]293 N.E.2d 788 (Ind. Ct. App. 1973).

[97]*Id.* at 790.

[98]278 N.E.2d 563 (Ind. 1972).

the bond therefor was not filed within the ten days specified by statute.[99]

The supreme court held that the bonding requirement of the statute was *not* jurisdictional; no appeal bond was necessary under the rules providing for appeal from interlocutory orders.[100] The supreme court also stated that the failure to file the bond might be a basis for dismissing the appeal if some prejudice was shown to the appellee. However, none was shown, nor did the appellee contend that it was prejudiced by the late filing of the bond required by statute.

In *Murphy v. Indiana Harbor Belt Railroad,*[101] the appellant filed its brief with the clerk of the court of appeals by depositing it in the mail on May 22, 1972, the last day in the case for filing. Service of a copy was made upon the appellee's counsel in his office on the next day, May 23, 1972, by personal delivery. The question[102] was whether the appellant met the requirement of Appellate Rule 12(B) that copies of all papers filed by any party shall, at or before the time of filing, be served by a party or a person acting for him on all the parties of the appeal.

It was obvious that the rule was not literally complied with and thus the court faced the question whether to dismiss the appeal. The court of appeals stated that it saw no reason for an automatic dismissal for the failure of a party to serve the opposing counsel at or before the time of filing. The court held that it is within the discretion of that court to effect a dismissal if the conditions of the case so dictated; here, such was not the case.[103] The court stated that the only rule which mandates dismissal once jurisdiction is conferred in an appellate court is Appellate Rule 8.1(A).[104]

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[99]IND. CODE § 32-11-1-5 (1971).

[100]Federal rule 73(d), upon which Trial Rule 62(D)(2) is based, has been similarly interpreted. W.H. Lailer Co. v. C.E. Jackson Co., 75 F. Supp. 827 (D. Mass. 1948).

[101]284 N.E.2d 84 (Ind. Ct. App. 1972).

[102]There was no issue as to the timeliness of the *filing* of appellant's brief since it was clearly filed within the requisite period.

[103]The court warned, however, that this opinion should not be interpreted as an invitation for appellate counsel to abuse the rules and inferred that a future court retains the power to dismiss for bad faith abuse of the rules. 284 N.E.2d at 87.

[104]Appellate Rule 8.1(A) directs the clerk to enter an order dismissing the appeal if appellant fails to file his brief within thirty days after filing the record.

In the case of *Anthrop v. Tippecanoe School Corp.*,[105] the supreme court reaffirmed its opinion in *Richards v. Crown Point Community School Corp.*,[106] in which it pointed out the bases for the appeal of interlocutory orders, as found in Trial Rule 72 and Appellate Rule 4(B). The court stated that in order to take an interlocutory appeal, the entry or order appealed must fit under the penumbra of an appealable interlocutory decree as established in the statute.

The court stated in this particular case that there was no interlocutory appeal available, because the appellants attempted to effect an appeal of a trial court entry which was made at the appellants' request upon a "Motion To Determine Aggregate Award of Appraisers" in a condemnation proceeding. The supreme court stated that the trial court's particular entry did not fall within the categories of interlocutory appealable orders found in the statutory provision. In short, it said that the trial court's entry was nothing more than an interpretation of the report of the appraisers in the case. Hence it was not appealable as either a final or an interlocutory order.

Lashley v. Centerville-Abington Community Schools[107] presented an appeal from an interlocutory-type order in which no motion to correct error was filed pursuant to Trial Rule 59(G). The order appealed from was one which overruled the appellant's objections to the appellee's complaint for the condemnation of real estate for school purposes. The argument was made on appeal that appellate jurisdiction could be invoked by an assignment of error in the court of appeals. The record of proceeding in the case was filed on November 1, 1972, and the appellant attempted to file an assignment of error in January 1973.

The court of appeals dismissed the appeal, but in doing so appeared to revive the old assignment of error practice as a jurisdictional prerequisite to an interlocutory appeal. The court said

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[105]277 N.E.2d 169 (Ind. 1972).

[106]269 N.E.2d 5 (Ind. 1971). Appellate Rule 4(B) provides for appeal in the following cases: (1) for payment of money or to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidence of debt documents or things in action, (2) for the delivery of the possession of real property or the sale thereof, (3) granting, or refusing to grant, or dissolving or overruling motions to dissolve preliminary injunctions, or the appointment of receivers, and (4) orders or judgments upon writs of habeas corpus not otherwise authorized to be taken directly to the supreme court.

[107]293 N.E.2d 519 (Ind. Ct. App. 1973).

that the timely filing of the record and the assignment of error has long been held to be a jurisdictional act and that without the assignment of error the appellant has not invoked the jurisdiction of the court on appeal. The holding would appear to be inconsistent with Appellate Rule 3(A).[108]

In the case of *Burcham v. Singer*,[109] the court of appeals restated a principle known as the "law of the case," which requires that the decision of the court of appeals rendered upon a given state of facts become the law of the case applicable to such state of facts. The court said that upon a new trial, if new evidence were introduced and new facts presented, then there would be a different case and the trial court would not be conclusively bound by the previous decision. However, if the cause is submitted for retrial upon the same facts upon which the decision was originally rendered, then the decision of the appellate court remains the law of the case and the trial court and an appellate court upon a subsequent appeal would be bound thereby. The principle was applicable in this case because after the case had once been before the court of appeals and remanded, no new facts or evidence were presented to the trial court. The only evidence was the evidence and pleadings filed and introduced in the original trial, as well as the decision of the court of appeals interpreting that evidence and pleadings in the former trial.

In *Alderson v. Alderson*,[110] the court gave notice by example of the significance of Appellate Rule 11(B)(2)(d), which provides that "error" which may serve as a basis for transfer from the court of appeals to the supreme court may include "that the decision of the court of appeals correctly followed ruling precedent of the supreme court, but that such ruling precedent is erroneous or is in need of clarification or modification . . . ."[111] The court overruled the doctrine of indivisibility in divorce appeals, and in so doing pointed out that the court of appeals had followed ruling precedent and was not in contravention thereof. However, the court held, for reasons stated in the opinion, that the petition to transfer would be granted "pursuant to this Court's inherent

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[108]Appellate Rule 3(B) specifically provides that the appellate court has jurisdiction on the date the record of proceedings is filed with the clerk of the supreme and appellate courts. *See generally* State v. Bridenhager, 276 N.E.2d 843, 844 (Ind. 1972).

[109]277 N.E.2d 814 (Ind. Ct. App. 1972).

[110]281 N.E.2d 82 (Ind. 1972).

[111]IND. R. APP. P. 11(B)(2)(d).

authority to change any ruling precedent once the appeal has been terminated in the Appellate Court."[112] The court then cited Appellate Rule 11(B)(2)(d), which became effective January 1, 1972.

The meaning of the rule, and the case, is clear. It is that the supreme court by rule, and case law, has established an appellate procedure by which it may review and redetermine precedents in Indiana, in cases which do not—in the court of appeals—conflict with former cases or precedents. Hence, the attorney may seek review in the supreme court on transfer of a case which adheres to precedent and which petitioner argues should be overturned or changed.

In the case of *Weldon v. State*,[113] the supreme court held that an order denying a motion to intervene was a final judgment from which an appeal would lie. The sustaining of a motion to strike a petition of intervention would also be a final judgment. The court stated that if a motion to intervene were granted, the controversy would not have ended and no appeal would lie at that point. It should be noted that after the trial court overruled the motion to intervene, the appellants filed a motion to correct errors prior to the appeal—a procedure which is required and to which the court gave its tacit approval.

In *Thompson v. Thompson*,[114] the supreme court held that pursuant to Indiana Code section 33-1-9-2[115] the trial courts of the State of Indiana are empowered to waive the cost of publishing summonses in divorce cases and that the refusal to do so was, on the facts of the cases before it, error. In these cases, the plaintiffs filed actions for divorce, and in each a petition was presented to the trial court that the actions be prosecuted as a poor person and thus that the filing fees, including the cost of publishing summons, be waived. The trial court determined that it had no authority to waive the cost of publication.

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[112]281 N.E.2d at 83. *See generally* Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969), which held that the supreme court of the state has the inherent constitutional duty to act as the final authority as to the law in the state.

[113]279 N.E.2d 554 (Ind. 1972).

[114]286 N.E.2d 657 (Ind. 1972).

[115]IND. CODE § 33-1-9-2 (1971) provides that any person entitled to institute a civil action may file a written statement under oath that, due to his poverty, he is unable to pay court costs or give security and seek waiver of such cost security.

On appeal, in addition to holding that the cost of publication could be waived,[116] the court held that the action of the trial court —the entry of orders refusing to waive costs of publishing summons—was a "final order" or judgment, in the sense that all of the issues were disposed of in the trial court. It was such an order that it was appealable as a final order or judgment; hence, no extraordinary writ would lie.

In *Indiana Alcoholic Beverage Commission v. Progressive Enterprises, Inc.*,[117] a question was raised whether the order appealed from was in law appealable to the supreme court. The appellee challenged the court's jurisdiction, contending the case an attempted appeal from a temporary restraining order which was not appealable. The court pointed out, however, that a second order was entered by the trial court which was, even though entitled a temporary restraining order, in fact a preliminary injunction. The court stated that it is the substance of the order which controls, not its caption, and that an order which is entered after notice and after an evidentiary hearing, as in the instant case, is in fact a preliminary injunction from which an appeal will lie. Accordingly, the court sustained its jurisdiction in that particular question.

In the case of *Johnson v. Jackson*,[118] the court of appeals considered the question of whether the statutory provision found in Indiana Code section 34-2-7-1 provides for a final order. That provision states that in all receiverships, the receiver, within such time as may be fixed by an order of the court, shall file with the court an account in final settlement.

In this case the receiver filed his account of all charges and credits with the court on April 15, 1970. The trial court entered an order dated June 4, 1971, which complied with the statute, and the question arose as to whether the June 4th order was a final order. The court of appeals held that it was not a final order in that it did not dispose of the proceeding and that pursuant to statute, a creditor or other interested party could file an objection or exception to the account or report. The final accounting

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[116]The trial court found as a fact that appellants could not pay the costs.

[117]286 N.E.2d 836 (Ind. 1972).

[118]284 N.E.2d 530 (Ind. Ct. App. 1972).

was not filed under October 2, 1971; hence the interim order was not a final order.[119]

The case of *City of Hammond v. Board of Zoning Appeals,*[120] set out several important principles which are operative when a trial court sustains a motion to dismiss on the ground that there was no jurisdiction in the court to entertain the action. The City filed an action against the Zoning Board, and pursuant to a Trial Rule 12(B)(1) motion, the trial court dismissed the action. Then the City filed a motion to reconsider, which was not passed upon, because the trial court granted leave to file an amended complaint. Thereafter, the Zoning Board renewed the motion to dismiss, which was sustained, and the former order of dismissal was reinstated. It was dated March 25, 1971 and a motion to correct errors was filed on June 28, 1971.

On appeal the court held that the first motion to dismiss under Rule 12(B)(1) was a final judgment and that a motion to reconsider will not toll the time requirement for filing a motion to correct error under Trial Rule 59 because Trial Rule 53.3 (then Trial Rule 53.2(B)) states that a motion to reconsider shall not extend the time for any further required or permitted action. The court also held that, pursuant to Trial Rule 15(A), a party can move to amend a dismissed complaint within sixty days from granting the 12(B)(1) judgment. If the leave to file an amended complaint is granted, that *will* toll the sixty day period under Trial Rule 59.

The factual sequence should again be noted: the second motion to dismiss was granted on June 24, 1971, but the trial court's order was to reinstate the first dismissal, entered on March 25, 1971. The motion to correct errors was filed on June 28, 1971, and under this case it was timely because the second dismissal came after the complaint was amended.

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[119]Citing State v. Burton, 112 Ind. App. 268, 44 N.E.2d 506 (1942), the court stated:

> A final judgment is one that disposes of a cause both as to the subject matter and the parties so far as the court has the power to dispose of it. An interlocutory order is one which does not so dispose of the cause but reserves or leaves some question or direction for future determination.

284 N.E.2d at 533.

[120]284 N.E.2d 119 (Ind. Ct. App. 1972).

Henceforth, the trial court practice should be to enter a second dismissal as of the date of its actual entry and not to "revive" the former order of dismissal. The reason is essentially one of court record keeping and timeliness on appeal, that is, the party's concern is a timely motion under Trial Rule 59. It may in fact have been timely, but the record may not show that it was, if the trial court does no more than "reinstate" the former dismissal. Hence, the trial court should enter its order of dismissal on the amended complaint anew.

III. Contracts and Commercial Law*

A. Scope of the Uniform Commercial Code

In *Helvey v. Wabash County REMC*[1] the Indiana Court of Appeals determined that electricity was "goods" within the meaning of Indiana Code section 26-1-2-105.[2] Plaintiff brought suit for breach of express and implied warranties and alleged certain damages caused to his household appliances by defendant's furnishing electricity of voltage higher than warranted. The suit was filed four years and two months after the incident in question occurred. The trial court entered summary judgment for defendant on the ground that Indiana Code section 26-1-2-725, a four-year statute of limitations, applied and barred the suit. On appeal, plaintiff argued that furnishing electricity was not a transaction in goods, but a furnishing of a service, and that the six-year statute of limitations for accounts and oral contracts[3] should apply.

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*Judith T. Kirtland.

[1]278 N.E.2d 608 (Ind. Ct. App. 1972).

[2]This section provides in part:

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. . . .
>
> (2) Goods must be both existing and identified before any interest in them can pass. . . .

[3]Ind. Code § 34-1-2-1 (1971).

The court stated that the criterion for "goods" was that it be an existing and movable thing.[4] In applying this test, the court noted that electricity was legally considered personal property which may be owned,[5] bartered and sold,[6] stolen,[7] and taxed.[8] The court further elaborated on the requirement that goods be existing and movable by declaring that "[l]ogic would indicate that whatever can be measured in order to establish the price to be paid would be indicative of fulfilling both the existing and movable requirements of goods."[9] Finally, the mandate of Indiana Code section 26-1-1-102(2)(c) that the statute was intended to promote uniformity among the states was cited as authority for the court's reliance on a Pennsylvania case[10] which held that natural gas was "goods" within the scope of the Uniform Commercial Code.

B. Warranties

During the survey period, the Indiana Supreme Court, in *Theis v. Heuer*,[11] considered the issue of implied warranties for fitness for habitability in the construction and sale of new homes. The supreme court, simply adopting the earlier decision[12] of the appellate court as its own, held that the doctrine of caveat emptor, espoused a decade ago in *Tudor v. Heugel*,[13] "can no longer be considered the law of this State with reference to implied warranty of fitness in regard to the purchase of a new residence . . ."[14] and that *Tudor* was expressly overruled.[15]

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[4]278 N.E.2d at 610.

[5]Hill v. Pacific Gas & Elec. Co., 22 Cal. App. 788, 136 P. 492 (1913).

[6]*Id.*

[7]IND. CODE § 35-1-66-3 (1971).

[8]Gross Income Tax Div. v. Chicago Dist. Elec. Generating Corp., 236 Ind. 117, 139 N.E.2d 161 (1956).

[9]278 N.E.2d at 610.

[10]Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964).

[11]280 N.E.2d 300 (Ind. 1972).

[12]Theis v. Heuer, 270 N.E.2d 764 (Ind. Ct. App. 1971), *noted in* 5 IND. LEGAL F. 221 (1971).

[13]132 Ind. App. 579, 178 N.E.2d 442 (1961). In *Tudor* the appellate court held that in the absence of fraud by the vendor or express warranties made by the vendor, no implied warranties arise in the sale of a new home.

[14]280 N.E.2d at 306.

[15]*Id.* at 303, 306.

Plaintiffs alleged in their complaint that they purchased a new home built by the vendors for speculative purposes, that shortly after moving into the house they discovered a defective sewer and drainage system which caused sewage and water to back up and accumulate on the first floor during periods of heavy rain, and that they neither knew nor had reason to know of this defect at the time of the purchase. The trial court, relying upon the doctrine of caveat emptor, dismissed the complaint for breach of warranty and negligence on the ground of failure to state a claim.[16]

The supreme court recognized the potential injustice of the application of the doctrine of stare decisis in this case and the illogic of affording more protection to the consumer who purchased a relatively inexpensive product than to one who made a substantial investment in a new home. These considerations led to the conclusion that implied warranties arise in the sale of all[17] new homes, at least when sold by the builder.[18]

The strengthening of warranties as a protection for the consumer was greatly assisted by *Woodruff v. Clark County Farm Bureau Cooperative,*[19] recently decided by the court of appeals. In this case plaintiff purchased several thousand chickens from defendant in order to replace his flock of egg-producing chickens.

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[16]*Id.* at 301.

[17]Several jurisdictions have recognized an exception to the doctrine of caveat emptor for new houses sold prior to the completion of construction. *See, e.g.*, Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Sterbcow v. Peres, 222 La. 850, 64 So. 2d 195 (1953); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963). This exception is based on the theory that such a contract is really a contract for construction, not for the sale of real estate. F & S Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963). Thus the courts have concluded that when one contracts to construct a building for a specific purpose, an implied warranty arises that the building will be constructed in a workmanlike manner and be suitable for its intended purpose, in this case habitation. Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

The *Theis* court adopted the broader approach which implies a warranty of fitness for habitability, regardless of whether the house was finished or unfinished at the time of sale. *See also* Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970); Schipper v. Levitt & Sons, 83 S.D. 57, 154 N.W.2d 803 (1967).

[18]For a discussion of the issues left unanswered by this decision, see 5 IND. LEGAL F. 221, 227-29 (1971).

[19]286 N.E.2d 188 (Ind. Ct. App. 1972).

It appeared that certain express statements were made by defendant's agent as to the quality and productivity of the chickens. However, when the chickens were delivered, plaintiff signed a receipt which he was told was intended "to show delivery," but which was entitled "Started Pullet Delivery and Acceptance Receipt" and contained language disclaiming all warranties, express or implied, as to the condition or quality of the chickens.[20] Subsequently, the flock was devastated by disease and its production capabilities were significantly reduced.

Plaintiff filed suit against Farm Bureau for breach of warranty, misrepresentation, and fraud. The trial court granted summary judgment for the defendant and on appeal, the primary issue was whether the trial court had erred "by determining no genuine issue of material fact existed as to express or implied warranties and by relying in part at least on the validity of the disclaimers in the Receipts in making such a determination . . . ."[21] The court of appeals concluded that reversible error had been committed because the warranty disclaimer was insufficient as a matter of law[22] to negative any express or implied warranties. Therefore, the case was reversed and remanded for the trier of fact to determine two issues: whether any express warranties upon which the vendee relied were in fact made and whether any warranties were breached by the actions of defendant.

In considering the effect of the disclaimer upon the implied warranties of merchantibility[23] and fitness for a particular purpose,[24] the court first stated that such warranties, because they

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[20]*Id.* at 191.

[21]*Id.* at 193.

[22]IND. CODE § 26-1-1-201(10) (1971) provides that whether a term or clause is "conspicuous" is for decision by the court.

In Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92 (Ind. Ct. App. 1972), *petition for rehearing denied*, 294 N.E.2d 617 (Ind. Ct. App. 1973), the court of appeals indicated that the jury might well have found a disclaimer not sufficiently conspicuous to comply with the requirements of section 26-1-2-316(2). In the later decision, denying the petition for rehearing, the court corrected this error by stating that the court must have reached this conclusion. But it seems apparent that there was nothing in the record to support this conclusion. This may be an indication of the lengths to which the Indiana appellate courts will go in order to sustain a jury verdict for the plaintiff in a warranties case.

[23]IND. CODE § 26-1-2-314 (1971).

[24]*Id.* § 26-1-12-315.

arose by operation of law to protect the consumer,[25] must be liberally construed in favor of the buyer[26] and that therefore disclaimers of implied warranties must be strictly construed against the seller.[27] It then concluded that such disclaimers must be conspicuous to be effective and that this requirement was not satisfied in this case. In so doing, the court expressly relied upon the language of Indiana Code section 26-1-2-316(2)[28] which requires a conspicuous disclaimer. However, the court found it unnecessary to consider the effect of section 26-1-2-316(3)[29] in this case. Subsection (3) apparently was intended by the drafters to control over subsection (2) in case of conflict. Subsection (3) begins with the language "[n]otwithstanding subsection (2)" and subsection (2) begins "[s]ubject to subsection (3)." Subsection (3) permits the use of language like "as is" to negate implied warranties and has no ex-

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[25]Intrastate Credit Serv., Inc. v. Pervo Paint Co., 236 Cal. App. 2d 547, 46 Cal. Rptr. 182 (1965); Vernali v. Centrella, 280 Conn. Supp. 476, 266 A.2d 200 (1970).

[26]Houston-Starr Co. v. Berea Brick & Tile Co., 197 F. Supp. 492 (N.D. Ohio 1961); L.O. Whybark Co. v. Haley, 37 Ill. App. 2d 22, 184 N.E.2d 798 (1962); Dougall v. Brown Bay Boat Works & Sales, Inc., 287 Minn. 290, 178 N.W.2d 217 (1970).

[27]Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1966).

[28]This section provides in part:

> Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. . . .

The court also cited two cases from other jurisdictions, Hunt v. Perkins Mach. Co., 352 Mass. 535, 226 N.E.2d 228 (1967), and Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968), in support of its conclusion that the disclaimer was ineffective. Arguably authorities from other jurisdictions are more persuasive in cases such as this than generally since UNIFORM COMMERCIAL CODE § 1-102(2) [IND. CODE § 26-1-1-102(2) (1971)] provides that one of the underlying purposes of the act is to make the law uniform among the various jurisdictions.

[29]This section provides in part:

> Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . .

press requirement that such language be conspicuous.[30] Since the delivery receipt contained such "as is" language and the court required conspicuousness, it seems that subsection (2) is to control over subsection (3) at least to the extent that the former requires a conspicuous disclaimer.[31] This result seems consistent with the desire to protect the consumer[32]—an opposite result would mean that a vendor could bury an otherwise insufficient disclaimer and make it effective simply by attaching the words "as is" without making it in any way obvious to the purchaser.[33]

In its discussion of the express warranties issue, the court emphasized the Code language which declares that express warranties and disclaimers are to be construed as consistent whenever possible but if such construction would be unreasonable, then the disclaimer or limitation is inoperative.[34] Again the court indicated

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[30]The subsection does however refer to the need for language that "calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . ." Arguably this language is indicative of an intent to incorporate the requirement of conspicuousness in this subsection as well as in subsection (2). *See* 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.1903, at 76-78 (1964). However, Professors White and Summers believe that the inclusion of the requirement of conspicuousness in subsection (3) was not the intent of the drafters. J. WHITE & R. SUMMERS, THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-6, at 366 (1972). *See also* Hogan, *The Highway and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 CORNELL L.Q. 1, 7-8 (1962).

[31]It has been argued that the purpose of subsection (2) was primarily to remove the requirement of a writing. *See* IND. ANN. STAT. § 19-2-316, Comment (1964).

[32]UNIFORM COMMERCIAL CODE § 2-316, Comment (1).

[33]*See* Gindy Mfg. Corp. v. Cardinale Trucking Corp., 111 N.J. Super. 383, 396, 268 A.2d 345, 353 (1970).

[34]IND. CODE § 26-1-2-316(1) (1971). *See* Wilson Trading Corp. v. David Ferguson Ltd., 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968).

An earlier version of this section provided that "[i]f the agreement creates an express warranty, words disclaiming it are inoperative." UNIFORM COMMERCIAL CODE § 2-316(1) (1952 version). At least one court has indicated that the new language "modifies the 1952 language, but the spirit of the provision remains the same." Berk v. Gordon Johnson Co., 232 F. Supp. 682, 688 (E.D. Mich. 1964).

Professor Nordstrum apparently agrees with this analysis since he cites *Berk* and Walcott & Steele, Inc. v. Carpenter, 246 Ark. 93, 436 S.W.2d 820 (1969), as authority for the statement that

> there is only one way for the seller to be certain that there are no express warranties in a sale—and that is not to use words or conduct which would be relevant to the creation of an express warranty.

R. NORDSTRUM, THE LAW OF SALES § 87, at 269 (1970).

that disclaimers are to be construed strictly against the seller[35] and concluded that if the statements made by Farm Bureau's agent were in fact express warranties, then the disclaimer was unreasonable.

Zoss v. Royal Chevrolet, Inc.,[36] a case recently decided by the Monroe County Superior Court, is also worthy of attention in any discussion of warranties. In *Zoss* the purchaser of an automobile sought to revoke his acceptance pursuant to Indiana Code section 26-1-2-608.[37] The revocation was based on a series of defects admittedly minor in the sense that they did not prevent the operation of the car[38] and an inability on the part of the defendant to repair the auto promptly. The primary issues were whether the written warranty tendered to plaintiff *after* the signing of the contract limited plaintiff's remedy in this case, whether plaintiff's notice of revocation was effective, and whether the alleged defects could satisfy the section 26-1-2-608(1) requirement that the value of the contract be "substantially" impaired.

Judge Bridges first emphasized that the decisional law is clear that a written automobile warranty is not part of the contract unless its terms are called to the attention of the buyer prior

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[35]286 N.E.2d at 200, *citing* Beech Aircraft Corp. v. Flexible Tubing Corp., 270 F. Supp. 548 (D. Conn. 1967); Berk v. Gordon Johnson Co., 232 F. Supp. 682 (E.D. Mich. 1964); Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1966).

[36]11 UCC REP. SERV. 527 (Monroe County, Indiana, Super. Ct., Nov. 15, 1972).

[37]This section provides in part:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it . . . .

[38]The court listed the following nonconformities among others: imperfections in the exterior finish, electrical problems, upholstery damage, various rattles, squeaky emergency brakes, extensive paint overspray in the interior, inadequate sealing and weather-stripping of windows and doors, improperly installed luggage rack, paint stains on the convertible top, nonfunctional windshield wipers, faulty engine adjustment, and excessive gas consumption.

to the signing of that contract.[39] Considering the second issue, the effectiveness of the revocation, the court relied upon *Orange Motors v. Dade County Dairies, Inc.*,[40] in which the Florida Court of Appeals judicially recognized the "lemon"—some cars "simply cannot be repaired."[41] The *Orange Motors* and *Zoss* courts indicated that while the seller has the right to make minor adjustments after delivery in order to make the car conform to any warranties, he does not have an unlimited period in which to repair. *Orange Motors* presented a factual situation remarkably similar to that in *Zoss*—the car was in the repair shop nearly one-half of the three months that it was in plaintiff's possession. Both courts concluded that revocation within three months was within a reasonable time.[42]

Finally, the court considered the question of whether the nonconformity relied upon by the plaintiff "substantially" impaired the value of the contract to the plaintiff.[43] The nonconformities taken individually were not substantial but the court recognized the cumulative effect of these minor nonconformities and held that such cumulative defects substantially impaired the contract's value. The court also cited a Georgia case[44] as authority for the proposition that unsuccessful repair was in itself a sufficient nonconformity to permit revocation of acceptance by the buyer. Plaintiff recovered damages for the purchase price of the car plus sales tax, registration fees, interest on the loan, insurance premiums, the cost of speakers installed in the car, pay lost while dealing with the seller, and additional consequential damages in the amount of $225.

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[39]11 UCC REP. SERV. at 531, *citing* Tiger Motors Co. v. McMurtry, 284 Ala. 283, 224 So. 2d 638 (1969); Marion Power Shovel Co. v. Huntsman, 246 Ark. 149, 437 S.W.2d 784 (1969); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968).

[40]258 So. 2d 319 (Fla. App. 1972).

[41]*Id.* at 321.

[42]IND. CODE § 26-1-1-204(2) (1971) provides that "[w]hat is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." For a discussion of the time periods involved, see Lanners v. Whitney, 247 Ore. 223, 428 P.2d 398 (1967).

[43]The test for substantial impairment is based upon value to the particular buyer in his particular circumstances. It is not limited by the actual knowledge of the seller. *See* UNIFORM COMMERCIAL CODE § 2-608, Comment 2. For a discussion of the meaning of substantial impairment, see Campbell v. Pollack, 101 R.I. 223, 221 A.2d 615 (1966).

[44]Jacobs v. Metro Chrysler-Plymouth, Inc., 188 S.E.2d 250 (Ga. App. 1972).

C. Remedies

1. Punitive Damages

Two important cases decided by the Indiana Court of Appeals during the survey period further developed Indiana law in the area of punitive damages in contracts cases. The general rule in Indiana is that punitive damages may not be recovered in an action for breach of contract.[45] However, it is apparent that a single act may give rise to an action in tort or for breach of contract; in such cases, if the essential elements of an award of punitive damages are otherwise present, a court is authorized to award such damages pursuant to a complaint sounding in tort or contract.[46]

However, the requirement that the essential elements of an award of punitive damages be present has created some uncertainty since it is unclear what the essential elements are. *Standard Land Corp. v. Bogardus*,[47] decided by the Indiana Court of Appeals, First District, and *Jerry Alderman Ford Sales, Inc. v. Bailey*,[48] decided by the Second District, discussed at length the issue of what elements will support an award of punitive damages in a contract case[49] and reached apparently inconsistent conclusions.

In *Standard Land* purchasers of lots in a housing development sued to enforce a contract between the vendor and the builder for the establishment of a planned community with a golf course. The suit resulted primarily from a determination by the vendor that it would not fulfill its contractual obligation to build, maintain, and make available the golf course facilities. Plaintiffs sued both the vendor and the builder; the builder then filed a cross-claim against the vendor. Of central concern in this discussion is the trial court's award of $5000 in punitive damages to the cross-claimant, apparently on the basis of the court's finding that the vendor

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[45]Hedworth v. Chapman, 135 Ind. App. 129, 192 N.E.2d 649 (1963).

[46]Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92 (Ind. Ct. App. 1972); Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953); 25 C.J.S. *Damages* § 25 (1955).

[47]289 N.E.2d 803 (Ind. Ct. App. 1972).

[48]291 N.E.2d 92 (Ind. Ct. App. 1972).

[49]Several tests have been used in Indiana tort cases in determining whether an award of punitive damages was proper. Some cases have required "oppressive malice or wantonness," while others have sustained an award based upon a "heedless disregard of the consequences." *See* Citizens' St. R.R. v. Willoeby, 134 Ind. 563, 33 N.E. 627 (1893); Jones v. Hernandez, 263 N.E.2d 759 (Ind. Ct. App. 1970); Monarch Buick Co. v. Kennedy, 138 Ind. App. 1, 209 N.E.2d 922 (1965).

acted in an oppressive manner and with a wanton disregard for the builder's rights.[50]

The court of appeals extensively reviewed Indiana case law concerning punitive damages in contract cases and concluded that such an award was sustainable only on the ground of fraud. The court considered the cases of *Murphy Auto Sales, Inc. v. Coomer*[51] and *Hedworth v. Chapman*,[52] both involving suits on contracts, and emphasized that despite the broad language used, especially in *Murphy*,[53] both cases contained allegations and findings of fraud. Because it was dealing with an exception to the general rule of no punitive damages in contract cases,[54] the court narrowly construed the holdings in *Murphy* and *Hedworth* and reversed the trial court's award of punitive damages since there was nothing in the record to support a finding of fraud.

The *Jerry Alderman* court considered the same issue and concluded that fraud was not necessary to recover punitive damages.[55] In this case, plaintiff sued for damages for breach of warranty and conversion and for breach of a contract of bailment and introduced evidence tending to show "malice and oppressive conduct" on the part of the defendant. The court extensively discussed *Murphy*, as did the First District in *Standard Land*, and determined that the broad language in the case was the relevant Indiana law, despite the actual allegations of fraud in that case.[56] Particularly emphasized was the *Murphy* language that "where malice, gross fraud and oppressive conduct is shown punitive damages are allow-

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[50]289 N.E.2d at 811.

[51]123 Ind. App. 709, 112 N.E.2d 589 (1953).

[52]135 Ind. App. 129, 192 N.E.2d 649 (1963).

[53]123 Ind. App. at 717-18, 112 N.E.2d at 593.

[54]In Voelkel v. Berry, 139 Ind. App. 267, 218 N.E.2d 924 (1966), the court analyzed *Hedworth* and determined that punitive damages were proper only when there was a finding of fraud and "facts which positively require it in the interest of justice." *Id.* at 270, 218 N.E.2d at 926.

[55]The issue of punitive damages actually arose in the context of an analysis of appellant's contention that the evidence of his "oppressive and malicious conduct" was improperly admitted since plaintiff failed to specifically allege fraud in her complaint. *See* IND. R. TR. P. 9(B). The court concluded, however, that the evidence was actually tending to show a malicious state of mind, not actionable fraud, and was therefore properly admitted pursuant to the second sentence in Trial Rule 9(B).

[56]291 N.E.2d at 98.

able . . . ."[57] *Murphy* was used as authority for the proposition that evidence of a malicious or fraudulent state of mind, evidence of the facts not amounting to fraud, would authorize an award of punitive damages in a suit sounding in contract.[58] The court merely noted the *Standard Land* decision without any discussion of the result.

2. Measure of Damages

The general rule of the measure of damages in breach of warranty actions is expressed in Indiana Code section 26-1-2-714 as "the difference between the value of the goods accepted and the value they would have had if they had been as warranted" plus incidental or consequential damages.[59] Consequential damages are recoverable to the extent that they are the direct, immediate, and probable result of the breach of an implied warranty.[60] The court of appeals in *Jerry Alderman Ford Sales, Inc. v. Bailey*[61] considered the issue of whether consequential damages include

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[57]123 Ind. App. at 718, 112 N.E.2d at 593.

[58]291 N.E.2d at 98. In denying a petition for a rehearing, 294 N.E.2d 617 (Ind. Ct. App. 1973), the court indicated that the jury might have based its award of punitive damages upon defendant's conversion when plaintiff brought the car in for repair as well as upon the evidence relating to the contract of sale. However, no limitation was placed upon the broad language as to the propriety of an award of punitive damages in a contract case.

[59]IND. CODE § 26-1-2-715 (1971) provides:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of the contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

[60]Bob Anderson Pontiac, Inc. v. Davidson, 293 N.E.2d 232 (Ind. Ct. App. 1973); *see* Drilling & Serv., Inc. v. Cato Enterprises, Inc., 134 Ind. App. 668, 191 N.E.2d 114 (1963).

[61]291 N.E.2d 92 (Ind. Ct. App. 1972).

damages for the loss of profits. Relying on Indiana case law[62] which antedated the adoption of the Uniform Commercial Code and Code cases from other jurisdictions,[63] the court concluded that Indiana law did not preclude the use of loss of profit[64] as a measure of damages,[65] even if the property was destroyed.[66] While the court

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[62]*See, e.g.*, Page v. Ford, 12 Ind. 46, 50 (1859), *citing* Dewint v. Wiltsie, 9 Wend. 325 (N.Y. Sup. Ct. 1832); Weedle v. I.R.C. & D. Warehouse Corp., 119 Ind. App. 354, 85 N.E.2d 501 (1949); Weismann Motor Sales, Inc. v. Allen, 106 Ind. App. 284, 19 N.E.2d 505 (1939).

[63]The court cited Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970); Steele v. J.I. Case Co., 197 Kan. 554, 419 P.2d 902 (1966); Ford Motor Co. v. Taylor, 60 Tenn. App. 271, 446 S.W.2d 521 (1969).

See Lewis v. Mobil Oil Corp., 438 F.2d 500 (8th Cir. 1971); Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111 (1971); Valley Die Cast Corp. v. A.C.W., Inc., 25 Mich. App. 321, 181 N.W.2d 303 (1970). *Contra,* Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963) (Uniform Sales Act case); Marion Power Shovel Co. v. Huntsman, 246 Ark. 152, 437 S.W.2d 784 (1969); Keystone Diesel Engine Co. v. Irvin, 411 Pa. 222, 191 A.2d 376 (1963); Head & Guild Equip. Co. v. Bond, 470 S.W.2d 909 (Tex. Civ. App. 1971). *See also* J. WHITE & R. SUMMERS, THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 10-4 (1972).

[64]Loss of profits awards are properly confined to net profit, not gross profit. 291 N.E.2d at 105, n.6. *See also* Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111 (1971); A.T. Klemens & Sons v. Reber Plumbing & Heating Co., 139 Mont. 115, 360 P.2d 1005 (1961); Ford Motor Co. v. Taylor, 60 Tenn. App. 271, 446 S.W.2d 521 (1969).

[65]The court did not make a distinction, as have some courts, between lost profits from contracts of which defendant was actually aware and those unknown to him at the time of the contracting. *See, e.g.*, Schaefer v. Fiedler, 116 Ind. App. 226, 63 N.E.2d 310 (1945); Weismann Motor Sales, Inc. v. Allen, 106 Ind. App. 284, 19 N.E.2d 505 (1939).

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> Thus to restrict the measure of damages to a difference in market value is to ignore that the right to use property is perhaps the most important incident of its ownership. . . . During the time defendant wrongfully withholds the property, ostensibly for purposes of repair, plaintiff is denied the use thereof and is not obligated to replace or seek to replace the equipment for the simple reason that he is not aware that he will not have his property restored to him in 100% functional order. When, however, it should appear or is made known to plaintiff that the property is worthless (subject to a reasonable time for replacement), then and only then does his right to loss of use cease.

291 N.E.2d at 105. *See* Steele v. Weidemann Mach. Co., 280 F.2d 380 (3d Cir. 1960); Chesapeake & O. Ry. v. Elk Refining Co., 186 F.2d 30 (4th Cir.

noted the rule that less certainty is required to prove the amount of lost profits than to prove that profits were in fact lost,[67] it remanded the case with instructions that plaintiff consent to a remittitur or a new trial be granted on the ground that the record did not contain evidence to support the substantial damages awarded.[68]

3. Limitations on Remedies

In *Indiana & Michigan Electric Co. v. Southern Wells School Building Corp.*[69] the supreme court defined the remedies available to a consumer who alleged an overcharge by a public utility. Southern Wells purchased electrical power from Indiana & Michigan Electric Co. and the latter supplied a written guarantee that total electric power costs would not exceed a specified amount. When defendant charged more than that rate and plaintiff paid only the maximum rate set forth in the guarantee, defendant served notice that electric power would be discontinued unless the balance was promptly paid. Southern Wells then obtained a preliminary injunction restraining the discontinuation of power. The supreme court concluded that the injunction should not have been granted because there existed an adequate remedy at law—Southern Wells should have paid the bill in full and then sued for the overcharge.[70] Some emphasis was placed upon the public or quasi-public nature of the consumer in this case.[71] However, much of the court's rationale would apply equally to the private consumer—the court stressed the public's interest in efficient and prompt utility services, "undiminished by depleted revenues."[72]

1950); Reynolds v. Bank of America Nat'l Trust & Sav. Ass'n, 53 Cal. 2d 49, 345 P.2d 296 (1959); New York Cent. R.R. v. Churchill, 140 Ind. App. 426, 218 N.E.2d 372 (1966).

[67]Reed v. Williams, 247 Ark. 314, 445 S.W.2d 90 (1969).

[68]*See* American Fletcher Nat'l Bank & Trust Co. v. Flick, 146 Ind. App. 122, 252 N.E.2d 839 (1969); Ford Motor Co. v. Taylor, 60 Tenn. App. 271, 446 S.W.2d 521 (1969). *See generally* Note, *Damages: Limitations on Recovery of Lost Profits in Indiana*, 31 IND. L.J. 136 (1955).

[69]279 N.E.2d 228 (Ind. 1972).

[70]The court noted that irreparable damage would likely have resulted from a discontinuation of electricity, but that there was no showing that funds were not availbale to pay the bill. Had such a showing been made, the court might have concluded that Southern Wells lacked an adequate remedy at law.

[71]279 N.E.2d at 229.

[72]*Id.*, *quoting from* State *ex rel.* Goodwin v. Cadwallader, 172 Ind. 619, 642, 87 N.E. 644, 652 (1908). *Goodwin* involved a dispute between the owners of two telephone exchanges and an attempt to compel the provision of services.

During the survey period, the court of appeals also considered the meaning of Indiana Code section 28-1-11-11[73] which provides that no bank shall be liable for the value of property received by it in safety deposit boxes. In *Welbourn v. Peoples Loan & Trust Co.*[74] plaintiff, a bank customer, brought suit against the defendant for losses suffered when his property was taken from a safety deposit box during a burglary. Although there was considerable evidence from which a jury could have found defendant negligent in maintaining its security system,[75] the trial court entered judgment on the evidence for the defendant on the theory that the statute plainly precluded a finding of liability regardless of the negligence of the defendant. The court of appeals first discussed the intent of the General Assembly in enacting the statute and concluded that it was to protect banks which had been diligent in protecting their depositories and their patrons' property. Since the bank's indemnity policy carrier would reimburse it for any judgment entered against it, and the bank's assets would, therefore, not be diminished, the court felt that the spirit of section 28-1-11-11 was not contravened by a finding of liability. Holding that an exception to the broad rule of the section existed when a bank has been negligent in protecting its customers' property and an indemnity policy would cover any loss suffered by the bank, the court reversed and remanded for a new trial.[76]

The court also noted that the terms of the agreement permitted defendant to terminate service to any customer indebted to it. *Cf.* Irvin v. Rushville Coop. Tel. Co., 161 Ind. 524, 531, 69 N.E. 258, 261 (1903).

[73]This section reads in part:

> No bank or trust company nor any of the assets thereof shall be liable, for the value of any property received by it pursuant to the power conferred by this section nor for damages for the loss, theft or misappropriation thereof.

[74]283 N.E.2d 544 (Ind. Ct. App. 1972).

[75]In its appellate brief, defendant admitted that such a finding could have been made by the trier of fact. *Id.* at 548.

[76]In a vigorous dissent, Judge Lybrook argued that this decision amounted to a judicial repeal of section 28-1-11-11. *Id.* at 551-53. He felt that the section was clear and unambiguous and that there was therefore no opportunity for judicial construction, despite the admittedly harsh result. *See* State *ex rel.* Mason v. Jacobs, 194 Ind. 327, 142 N.E. 715 (1924); Boryczka v. Boryczka, 87 Ind. App. 511, 161 N.E. 830 (1928).

D. Insurance

In *Vernon Fire & Casualty Insurance Co. v. Thatcher*[77] the court of appeals determined that evidence that an insurance company's agent solicited an application for a policy and delivered the policy to the insured was "sufficient to imply that the agent [was] authorized by the company to represent to the solicitee, for the purpose of inducing an order, the provisions of the policy coverage . . . ."[78] Plaintiffs, owners of a farm in Owen County and a saddle barn concession in a state park, obtained a farm-owner's policy issued by defendant and solicited by an agent of defendant. The policy insured unscheduled personal property both on the farm premises and away from the farm. However, the coverage on the property away from the farm was specifically limited by an exclusionary clause stating that "[p]roperty pertaining to a business [was] not covered."[79] Despite this exclusion, the soliciting agent represented to plaintiffs on at least two occasions that all property at the saddle barn, including that used in operating the concession, was covered under the policy. When a fire at the saddle barn destroyed property used in the business, defendant refused to pay for the loss.

The court of appeals recognized that defendant had not actually authorized the agent to make the particular statements as to the extent of coverage, but concluded that the actual authority of the agent was not the issue. The court specifically disapproved language in an earlier opinion[80] indicating that an applicant for insurance was "presumed to know that under our law [the agent's] authority to represent the appellant company was required to be in writing"[81] and that it was the duty of the applicant who dealt "with a special agent to ascertain the extent of the agent's authority before dealing with him."[82] Considering the evidence in the instant case, the court of appeals concluded that the insured had the right to assume that the soliciting agent was authorized to make the representations in question, particularly since the statements were made in the presence of defendant's Special Representative who managed all southern Indiana operations and was authorized to

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[77]285 N.E.2d 660 (Ind. Ct. App. 1972).

[78]*Id.* at 662.

[79]*Id.*

[80]State Life Ins. Co. v. Thiel, 107 Ind. App. 75, 20 N.E.2d 693 (1939).

[81]*Id.* at 88, 20 N.E.2d at 698.

[82]*Id.* at 89, 20 N.E.2d at 698.

explain policy coverage to an insured.[83] It is unclear from the decision whether the actual knowledge of defendant was essential to the result but the court's language in its discussion of *Farmers Mutual Insurance Co. v. Wolfe*[84] did not seem to require such knowledge. The court stated that the issue of the soliciting agent's authority was not decided in that case and that the *Farmers Mutual* decision should not be read "to imply that authority to solicit insurance [did] not carry with it, as a power impliedly incidental thereto, the apparent authority to state what the policy [covered]."[85]

IV. Corporate Taxation*

During the survey period, the Indiana Supreme Court and Court of Appeals handed down three decisions concerned with corporate taxation. Statutory interpretations of the Indiana Code concerning penalty abatement, interstate business activities by Indiana corporations, and gross income exemptions are the areas in which the courts construed corporate tax laws.

In *Buell v. Budget Rent-A-Car, Inc.*,[1] the Treasurer of Marion County made demand for taxes, penalties, and interest pursuant to

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[83]On these grounds, the court distinguished Cadez v. General Cas. Co., 298 F.2d 535 (10th Cir. 1961), in which the court refused to hold the insurance company liable for the soliciting agent's representations, of which the company had no knowledge. The *Cadez* court indicated that it would have reached a different result had there been a showing of knowledge:

> If untrained or over-zealous agents make a negligent or reckless representation as to policy coverage and it can be shown that the company had actual knowledge thereof or that knowledge may be implied from the circumstances of a particular situation, the company must accept the responsibility.

Id. at 537.

[84]142 Ind. App. 206, 233 N.E.2d 690 (1968).

[85]285 N.E.2d at 671.

*Robert G. Leonard.

[1]227 N.E.2d 798 (Ind. Ct. App. 1972).

Indiana Code section 6-1-53-1[2] against the taxpayer corporation for the years 1963 through 1968. The Treasurer did not proceed against the corporation until 1970, but claimed that Indiana Code section 6-1-53-2[3] entitled the state to the entire amount due and owing, and subsequently levied upon the taxpayer's personal property. The trial court, granting taxpayer's request for a restraining order, ruled that an abatement of penalties for delinquencies was justified, excepting those penalties attributable to the taxable year 1968 and payable in 1969.[4] The Court of Appeals of Indiana affirmed the trial court's decision on the basis of nonexhaustion of the appropriate administrative steps, *i.e.*, failure to proceed against the taxpayer corporation in earlier years.[5]

Indiana Code section 6-1-60-3[6] explicitly uses the word "tax," not the word "penalty," which must be interpreted to mean that only the taxes of the delinquent taxpayer can be carried forward for those years in which the Treasurer chooses not to proceed pursuant to section 6-1-53-2. Because the amounts representing taxes and penalties are clearly separable, the Treasurer is not precluded from collecting the delinquent taxes in the future, but the penalties for prior years must be abated.

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[2]This section states:

> Annually . . . each county treasurer shall make one (1) demand . . . upon every resident of the county who has not paid the personal property and poll taxes owing by him, for the amount of such delinquent taxes with penalties and the costs of the demand. . . . [I]f such amount is not paid within thirty (30) days from the date of the demand sufficient personal property of the taxpayer shall be sold to satisfy such amount or that a judgment may be entered against him in the circuit court of the county as provided by [IND. CODE § 6-1-53-2 (1971)].

[3]This section provides:

> If the delinquent taxes with penalties and costs of the demand are not paid within thirty (30) days from the date of the demand required by [IND. CODE § 6-1-53-1 (1971)], the county treasurer shall proceed to levy upon sufficient personal property of the taxpayer to pay such amount, and to sell the same as hereinafter provided.

[4]277 N.E.2d at 800.

[5]*Id.* at 801.

[6]This section states:

> If the tax for any year or years on any property liable to taxation cannot be collected by reason of any erroneous proceeding, the amount of such *tax* shall be added to the amount to be collected in the next succeeding year.

(Emphasis added).

Once a demand has been made pursuant to section 6-1-53-1, the Treasurer has two alternative remedies available to him to satisfy the debt. He can wait thirty days for satisfaction by the taxpayer and then levy upon his personal property by virtue of section 6-1-53-2, or he may elect not to levy and instead wait sixty days and, upon taxpayer's failure to make full payment, prepare a record of the delinquency and file it with the circuit or superior court pursuant to Indiana Code section 6-1-55-1.[7] This filing has the same effect as a judgment, and the amount due draws interest in lieu of penalty.[8] However, both methods require that the Treasurer make an annual demand in accordance with section 6-1-60-3.

In *Indiana Department of State Revenue v. Purcell Walnut Lumber Co.*,[9] the Court of Appeals of Indiana held that the gross income tax exemption in Indiana Code section 6-2-1-1[10]

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[7]This section states:

> In the year following any year in which a deliquency in the payment of any installment of taxes on personal property . . . has occurred, and a demand for payment has been made pursuant to [IND. CODE § 6-1-53-1 (1971)] . . . any amount for which demand was so made remains after sixty (60) days from the date of said demand, the county treasurer shall prepare a record of all such delinquencies. . . . On and after deposit of said record in the office of the clerk of the circuit court, the amounts of delinquent taxes, penalties and costs stated therein shall constitute a debt of the person named, which debt shall in all respects have the same force and effect as judgments. The judgments so entered shall be in favor of the county for the benefit of all taxing units having an interest therein. From the date of deposit of the record in the office of the clerk of the circuit court, the judgments shall bear interest at the same rate as other judgments and such interest shall be in lieu of penalties which would have otherwise accrued on the taxes. . . .

[8]277 N.E.2d at 800.

[9]282 N.E.2d 336 (Ind. Ct. App. 1972).

[10]IND. CODE § 6-2-1-1 (1971) states:

> That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term "gross income" shall not include gross receipts received from sources outside the state of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the state of Indiana, or from activities incident thereto. . . .

Gross income of an Indiana corporation doing business at a situs outside the state will not therefore include receipts from such out-of-state sources. But to qualify for the above stated exemption, the corporation must be

did not apply to an Indiana corporation authorized to do business in Kansas, which sold lumber to its own resident agent in Indiana.

Purcell, although incorporated in Indiana, located its office and conducted its business in Kansas. As required by statute, Purcell maintained a resident agent, Amos-Thompson Corporation (also formed under state law), in Indiana. The Department assessed a gross income tax against income received by Purcell from its sales to Amos.

In reversing the trial court, special attention was given to the exact definition of the word "sources" because the statute specifically states that the gross income of an Indiana corporation doing business at a situs outside the state "shall not include gross receipts received from *sources* outside the state of Indiana. . . ."[11] If the proper definition referred to the situs of the customers of that corporation, then Indiana corporations doing business out-of-state would nevertheless be taxed if they sold to customers within the state. But "sources" could also logically refer to the situs at which the seller's business is being conducted. This interpretation would allow such Indiana corporations doing their principal business outside this state to escape the Indiana gross income tax while being taxed by the state in which they are located. The statute, however, specifically creates a category of taxpayers consisting of Indiana corporations "authorized to do and doing business in any other state."[12] Indeed, as the court pointed out, to interpret "sources" to mean anything other than the situs of the customer would allow every Indiana corporation having its main office outside the state to be exempt from the Indiana gross income tax because such income would have been derived from an out-of-state source.[13] Because the income received by Purcell was from a source inside the state (its own resident agent), and because it was an Indiana corporation, the exclusion allowed by section 6-2-1-1 did not apply.

The court further opined that the imposition of the gross income tax upon this source of income did not violate the com-

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incorporated under Indiana laws, conducting business in another state, and deriving income from sources outside the state.

[11] *Id.* (Emphasis added).

[12] *Id.*

[13] 282 N.E.2d at 340-41.

merce clause of the United States Constitution.[14] It is a well settled principle that a state has the power to tax corporations conducting interstate commerce if the tax has a relation to opportunities, benefits, or protection afforded by the taxing state.[15] Due process requires that there be a definite link or connection between the state and the corporation it seeks to tax.[16] The court specifically cited *Mueller Brass Co. v. Gross Income Tax Division*[17] as authority for allowing the court to examine the bundle of corporate activity in order to determine if an adequate nexus between the corporation and the state did in fact exist.[18] While corporations conducting interstate commerce are not immune from state taxation, absent action by Congress, the state tax must neither provide direct commercial advantage to local business[19] nor create a multiple taxation system.[20] Because the state tax burden here was reasonably apportioned to the Indiana activities of Purcell concerning its sales to Amos, the court evidently found no unreasonable burden placed on the conduct of interstate business by the corporation.[21]

In *Gross Income Tax Division v. B. F. Goodrich Corp.*,[22] the Supreme Court of Indiana interpreted the same statute which the *Purcell* court construed. The court here concluded that the statute, Indiana Code section 6-2-1-1, was neither contrary to

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[14]U.S. CONST. art. I, § 8(3) states that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

[15]*See* Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590 (1954).

[16]*See* Mueller Brass Co. v. Gross Income Tax Div., 255 Ind. 514, 265 N.E. 2d 704 (1971).

[17]*Id.* This case involved a Michigan corporation which conducted business in Indiana through its office and sales representatives (statutory agent), but shipped goods ordered in Indiana from its Michigan plant directly to the customers solicited by the salesmen.

[18]282 N.E.2d at 341-42.

[19]*See* Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

[20]*See* Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

[21]*See* General Motors Corp. v. Washington, 377 U.S. 436 (1964). In this decision, the United States Supreme Court gave states the authority to place a reasonable tax burden on corporations conducting interstate activities, if the tax was properly apportioned, and if the subject of the tax was not such an integral part of the interstate flow of commerce that it could not be separated from the intrastate corporate activity.

[22]292 N.E.2d 247 (Ind. 1973).

the due process clause of the fourteenth amendment[23] (which requires the taxing state to have a definite link, a certain degree of contact, or nexus between itself and the corporation being taxed[24]) nor prohibited by the operation of the commerce clause.[25] However, the court felt that the danger inherent in an unapportioned gross receipts tax created a risk of cumulative burdens on interstate commerce which was specifically prohibited.

Goodrich had received proceeds from the dissolution of a Delaware corporation in which it had been a shareholder. It listed the income as an "out-of-state security transaction,"[26] and therefore exempt from the Indiana gross income tax by virture of the due process and commerce clauses. It is a virtual certainty that no corporate taxpayer which is incorporated in Indiana, as Goodrich, can deny the state's jurisdiction to tax the corporation on money received by it while conducting business in Indiana or any other state. The mere fact that it is incorporated in this state implies that it is afforded all the rights, protections, and privileges of Indiana's government and is, in turn, expected to bear the responsibility shouldered by the remaining residents for the maintenance of that government.[27] Even though a state may have due process jurisdiction over a corporation, it may nevertheless lack the power to tax its receipts because the commerce clause prohibits an unapportioned gross receipts tax which results in a multiple tax burden.[28] Therefore, if the tax is fairly apportioned to the corporation's activities in Indiana, the Indiana courts have apparently concluded that this satisfies the commerce clause requirements.

The court here cited Indiana Code section 6-3-2-2[29] as giving the state statutory power to apportion a corporation's revenue

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[23]U.S. CONST. amend. XIV, § 1 states that: "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

[24]292 N.E.2d at 249-50.

[25]*See* note 14 *supra.*

[26]292 N.E.2d at 248.

[27]*See* Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940).

[28]*See* Pacific Broadcasting Corp. v. Riddell, 427 F.2d 519 (9th Cir. 1970).

[29]IND. CODE § 6-3-2-2 (1971) states:

With regard to corporations and nonresident persons, "adjusted gross income derived from sources within the state of Indiana," for purposes of [IND. CODE § 6-3-1-1 to 6-3-7-4 (1971)], shall mean and include

and levy a tax on that portion of its gross receipts attributable to its Indiana activities. Apparently, the court concluded that the tax imposed by section 6-2-1-1 was not a tax on interstate commerce, as interpreted by the Indiana courts, but a tax on the privilege of doing business within Indiana measured by the gross income of a domestic corporation. However, the income must be apportioned properly because of the interstate aspects of the overall transaction.[30]

Although the court did not cite the *Purcell* decision, it is obvious that the two cases compliment each other by making it clear that corporations which are incorporated within Indiana and receive a portion of their gross income from out-of-state sources will not be entitled to the exemption pursuant to section 6-2-1-1 if the intrastate and interstate activities can be separated, and the tax accordingly apportioned between these two activities.

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income from real or tangible personal property located in this state; income from doing business in this state; income from a trade or profession conducted in this state; compensation for labor or services rendered within this state; income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises and other intangible personal property having a situs in this state. . . . In the case of business income, only so much of such income as is apportioned to this state . . . shall be deemed to be derived from sources within the state of Indiana.

. . . If the business income derived from sources within the state of Indiana of a corporation or nonresident person can not be separated from the business income of such person or corporation derived from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana by a fraction, the numerator of which is the property factor plus the pay-roll factor plus the sales factor, and the denominator of which is three (3).

[30]292 N.E.2d at 251.

V. Corporations

*Paul J. Galanti**

A. Shareholder Actions—Necessary Parties

Procedural problems and necessary parties in shareholder actions involving corporations in receivership were the issues resolved by the Indiana Supreme Court in *Sacks v. American Fletcher National Bank & Trust Co.*[1] The suit arose out of a financing agreement between JJS Co., an Indiana corporation, and the American Fletcher National Bank and Trust Company. The loan was personally guaranteed by plaintiff-appellant Sacks, one of the three shareholders of JJS Co., and defendant-appellee Blue, another shareholder. AFNB refused to renew the original loan or to extend additional credit when the loan remained unpaid at maturity. Rather, it brought suit in the Superior Court of Marion County to foreclose the security interests it held on the loan and for the appointment of a receiver. After his petition to the superior court for leave to sue in another forum was denied, Sacks brought the instant suit in Marion County Circuit Court. His second amended complaint asserted a shareholder derivative suit charging Blue and AFNB with misrepresentation, deceit, and breach of fiduciary obligations.[2] Sacks' principal assertion was that he had been assured that AFNB would provide continual financing for the corporate venture. Appellees filed motions to dismiss pursuant to Trial Rule 12(B)(7) and argued that the receiver, an indispensable party, had not properly been made a party to the suit since leave of the receivership court had been denied. The appellees' motions to dismiss were sustained, and Sacks appealed. The judgment was affirmed in part, reversed in part, and remanded with instructions.

Appellant contended that (1) the receiver was not an indispensable party under Trial Rule 19 and (2) even if the derivative action was properly dismissed for failure to join an indispensable party, the entire action should not have been dismissed because appellant also had a personal action against the appellees.[3] The supreme court accepted appellees' contention that there was a

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The author wishes to express his appreciation to Rex Cowan and Scott Koves for their assistance in the preparation of this discussion.

[1]279 N.E.2d 807 (Ind. 1972). Justice Hunter wrote the opinion. Justice DeBruler did not participate.

[2]*Id.* at 809.

[3]*Id.* at 810.

failure to join an indispensable party according to Trial Rule 19 when the receivership court denied Sacks leave to sue. The holding was premised on the well-established principle that the corporation is not merely a proper party to a derivative suit but an essential, indispensable party. The failure to make the corporation a party destroys the shareholder's cause of action and deprives the court of jurisdiction.[4] The supreme court emphasized that one of the reasons mandating joinder of the corporation was that it must be a party to receive the fruits of any recovery by the plaintiff.[5] There is, of course, a second major reason for the principle in that the corporation must be bound by the judgment in a derivative action and not be free to institute its own subsequent suit against the same defendants for the same alleged misdeeds.[6] The corporation is, in reality, the real party plaintiff in the suit, but enters the litigation as a nominal party defendant.[7]

The application of the principle in the *Sacks* case was complicated by the receivership of JJS Co. The supreme court ruled that under such circumstances the receiver, as the representative of the corporation, was the necessary party. No Indiana authority was cited for the proposition, but it does comport with the general rule obtaining in other jurisdictions. However, the determination that the receiver was a necessary party did not

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[4]IND. R. TR. P. 19(B). *See* Carter v. Ford Plate Glass Co., 85 Ind. 180 (1882); 13 W. FLETCHER, PRIVATE CORPORATION § 5997, at 456 (perm. repl. ed. 1970) [hereinafter cited as FLETCHER]; H. HENN, LAW OF CORPORATIONS § 369 (1970) [hereinafter cited as HENN]; N. LATTIN, CORPORATIONS § 106, at 425-26 (2d ed. 1971) [hereinafter cited as LATTIN]. The courts do recognize an exception to this rule when a corporation's existence has been completely terminated prior to the commencement of the action. Weinert v. Kinkel, 296 N.Y. 151, 71 N.E.2d 445 (1947); HENN § 369, at 777; LATTIN § 106, at 425-26. Lattin points out that the rule requiring joinder can cause injustice when the real party defendants are in a jurisdiction in which the corporation itself cannot be personally served.

[5]13 FLETCHER § 5997, at 456. *See also* HENN § 369, at 777; LATTIN § 106, at 425-26.

[6]Philipbar v. Derby, 85 F.2d 27 (2d Cir. 1936); Turner v. United Mineral Lands Corp., 308 Mass. 531, 33 N.E.2d 282 (1941); Dean v. Kellogg, 294 Mich. 200, 292 N.W. 704 (1940); 13 FLETCHER § 5998; HENN § 369, at 777; LATTIN § 106, at 426.

[7]13 FLETCHER § 5997; HENN §§ 364-67; LATTIN § 106, at 425. Indiana Rule of Trial Procedure 23.1 establishes the conditions precedent to a shareholder derivative action. The Trial Rule parallels Federal Rule of Civil Procedure 23.1 except that the shareholder demand requirement has been eliminated. *See generally* 13 FLETCHER § 6008; 2 W. HARVEY, INDIANA PRACTICE 365-89 (1970) [hereinafter cited as HARVEY]; HENN §§ 364-66; LATTIN § 105.

resolve the issue entirely since it was further complicated by the receivership court's denial of Sacks' petition for leave to sue the receiver in another court.[8]

The supreme court resolved this point, albeit with some degree of confusion, by essentially advising Sacks that he was in the wrong court and that the derivative action should have been brought in the receivership court itself.[9] The starting point for the supreme court was the doctrine that leave to sue a receiver must be obtained from the receivership court as a condition precedent to the action.[10] Justice Hunter then qualified this statement by noting that "this [the failure to obtain leave] alone is not sufficient to sustain a motion to dismiss. One must also determine whether it is feasible to join the necessary party."[11] Since leave to sue had been denied, it was clear that it was impossible to join the receiver as a party to the circuit court proceeding.

Although there are later cases, the leave issue, at least in recent years, apparently has not been a significant problem in Indiana. The most recent decision is *Malott v. State ex rel. Board of Commissioners*,[12] decided in 1902. The *Malott* decision held that a receiver cannot be sued without leave of the appointing court and the effect of the failure to obtain permission to sue the receiver vitiates jurisdiction. Thus, Indiana may be classified as adhering to the majority rule that although leave to sue is generally required, failure to secure permission to sue a receiver appointed by a state court does not affect the jurisdiction of the court in which suit is brought, when the suit is brought in the receivership court or when the receiver was appointed by a court of the United States.[13] The controlling authority, *Curtis v. Mauger*,[14] stated that

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[8]*See e.g.*, Coyle v. Skirvin, 124 F.2d 934 (10th Cir.), *cert. denied*, 316 U.S. 673 (1942); 13 FLETCHER § 5999; HENN § 369, at 777.

[9]279 N.E.2d at 811.

[10]*See* Malott v. State *ex rel.* Board of Comm'rs, 158 Ind. 678, 64 N.E. 458 (1902); Keen v. Breckenridge, 96 Ind. 69 (1884). *See also* Fields v. Fidelity Gen. Ins. Co., 454 F.2d 682 (7th Cir. 1971); Annot., 29 A.L.R. 1460 (1924).

[11]279 N.E.2d at 811. *See* 2 HARVEY 262-65.

[12]158 Ind. 678, 64 N.E. 458 (1902).

[13]Annot., 29 A.L.R. 1460 (1924). *See* Curtis v. Mauger, 186 Ind. 118, 114 N.E. 408 (1916). The *Curtis* case was cited in Merryweather v. United States, 12 F.2d 407, 409 (9th Cir. 1926), which held that the failure to obtain leave from a state receivership court barred an action by the United States against the receiver in a federal court.

[14]186 Ind. 118, 114 N.E. 408 (1916).

the roots of the distinction between suits brought in the receivership court and suits brought in other courts arose from the United States Supreme Court's decision in *Barton v. Barbour*.[15] The *Barton* Court held that leave of the court appointing the receiver must be obtained as a jurisdictional prerequisite to maintaining an action against the receiver in another jurisdiction.

Curtis described the rationale of the doctrine as the necessity of preventing one set of creditors from gaining an advantage in the enforcement of their claims by proceeding against an estate in a jurisdiction where property could be found but where the receivership court would be without power to prevent injustice to other creditors.[16] Although the doctrine arises out of suits brought in different jurisdictions, it is certainly appropriate for different courts within the same jurisdiction. As a corollary, leave is not required if the action is brought in the receivership court, and the lack of an allegation that leave has been granted will not be fatal to the court's jurisdiction over the derivative action.[17] Thus, Sacks was not without remedy, but the derivative action should have been brought in the Superior Court of Marion County. As the receiver was not properly a party to the derivative action in the circuit court, sustaining the motions to dismiss under Trial Rule 19(B) as to the derivative aspect of the complaint was correct.

Shareholder Sacks was not entirely without success. His contention that it was erroneous to sustain the motions to dismiss because the complaint asserted a personal cause of action against appellees was accepted in part. The court recognized that the primary thrust of the suit was that the corporation had been injured by the alleged derelictions of appellees Blue and AFNB, but noted that Sacks' personal guarantee of the loan to JJS Co. could possibly impose liability on him for the principal amount and be the basis of a personal cause of action.[18] The court relied on the Seventh Circuit's decision in *Buschmann v. Professional Men's Association*[19] and the Fifth Circuit's decision in *Schaffer v. Universal Rundle Corp.*[20] These cases recognized that the same con-

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[15]104 U.S. 126 (1881). *Accord,* Keen v. Breckenridge, 96 Ind. 69 (1884).

[16]186 Ind. at 121, 114 N.E. at 409.

[17]*Id.*

[18]279 N.E.2d at 811-12.

[19]405 F.2d 659 (7th Cir. 1969).

[20]397 F.2d 330, 335 (5th Cir. 1972).

duct can result in both a derivative cause of action on behalf of an injured corporation and a personal cause of action for a shareholder when there is a breach of a duty owed specifically to that shareholder separate and distinct from the duty owed to the corporation.[21] The *Sacks* case was cited with approval on this point by the Fifth Circuit in *Empire Life Insurance Co. of America v. Valdak Corp.*[22] The *Empire Life* court relied on the general rule that a shareholder suing for corporate mismanagement must bring the suit derivatively in the name of the corporation unless there is a violation of a duty owing directly to him. In further expounding on this point, the court referred to its earlier *Schaffer* decision in which it said:

> [The] exception to the general rule does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the stockholder, but is confined to cases where the wrong itself amounts to a breach of duty owed to the stockholder personally.[23]

The supreme court concluded that it was not clear that Sacks was not entitled to any relief on his complaint,[24] and consequently it reversed the judgment in part and remanded with instruction to treat the motions to dismiss by appellees Blue and AFNB as motions for a more definite statement under Trial Rule 12(E) and to proceed accordingly.[25]

B. Inspection of Shareholder Lists

In a three to two decision, the Indiana Supreme Court in *State ex rel. Great Fidelity Life Insurance Co. v. Circuit Court*[26]

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[21]279 N.E.2d at 811.

[22]468 F.2d 330, 335 (5th Cir. 1972).

[23]397 F.2d at 896.

[24]*Compare* Buschman v. Professional Mens' Ass'n, 405 F.2d 659 (7th Cir. 1969), *with* Smith v. Parker, 148 Ind. 127, 45 N.E. 770 (1897), which involved an action for a breach of contract to furnish new capital to a corporation. The court held that the suit was properly dismissed since defendant's promise ran only to the corporation, and the shareholder-plaintiff, who was a guarantor of the loan, had sustained no damage separate from that sustained by the corporation. *See* John Walker & Sons v. Tampa Cigar Co., 197 F.2d 72, 73 (5th Cir. 1952); 1 HARVEY 605.

[25]The court affirmed the granting of the receiver's motion to dismiss AFNB's contention that personal jurisdiction had not been obtained was rejected because, even if it were true, there was no showing that such jurisdiction could not be obtained. Therefore, this was not a proper basis for a motion to dismiss.

[26]288 N.E.2d 143 (Ind. 1972). Justice Givan wrote the majority opinion with Chief Justice Arterburn and Justice Hunter concurring. Justice DeBruler dissented in an opinion with which Justice Prentice concurred.

held that shareholders of an Indiana insurance company were not entitled to judicially compelled examination of the company's books and records, particularly shareholder lists, and that the Indiana Department of Insurance had sole jurisdiction under the provisions of title 27 of the Indiana Code to compel the production of such documents. Relators were Great Fidelity Life Insurance Co., a corporation organized under the insurance laws of Indiana, its officers and directors, and Southern Securities Corp., which owned over fifty per cent of Great Fidelity. The case was initiated by a minority shareholder of Great Fidelity who filed a derivative action alleging a fradulent conspiracy, gross negligence, and mismanagement of the affairs of the company, and a companion mandamus action against relators seeking the production of the shareholder lists of Great Fidelity and its parent, Southern Securities.[27] Relators then petitioned the supreme court to issue a writ of prohibition commanding the Circuit Court of Posey County and its judge to refrain from proceeding further in both suits.

In resolving dispute, the supreme court, relying on *Lowery v. State Life Insurance Co.*,[28] determined that the derivative action could produce an "order, judgment or decree" interfering with the operation of the business of Great Fidelity contrary to Indiana Code section 27-1-20-23.[29] The *Lowery* court indicated that the rationale behind a similar statute was to preclude suits interfering with "the management of the corporate affairs, and which might produce hopeless confusion, and might impair the efficiency of the company, if not wreck it."[30] *Lowery*, it should be noted, involved an action against an insurance company, but the majority held that the bar applied to actions brought on behalf of insurance companies as well as against them.[31] In fact, the majority, citing *State ex rel. Mid-*

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[27] *Id.* at 144-45. Plaintiffs petitioned the Indiana Department of Insurance to enter the derivative action against the relators, but the Department declined to do so.

[28] 153 Ind. 100, 54 N.E. 442 (1899).

[29] IND. CODE § 27-1-20-23 (1971) provides as follows:

> No order, judgment, or decree providing for an accounting or enjoining, restraining or interfering with the operation of the business of any insurance company, association, or society, to which any provision of this act is applicable, or for the appointment of a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the department, except in an action by a judgment creditor or in proceedings supplemental to execution.

[30] 153 Ind. at 106, 54 N.E. at 444.

[31] 288 N.E.2d at 145. *See* State *ex rel.* Mid-West Ins. Co. v. Superior Court, 231 Ind. 94, 106 N.E.2d 924 (1952).

West Insurance Co. v. Superior Court[32] stated that the bar was so complete that the Department of Insurance would have to initiate any proceedings and could not intervene for a plaintiff subsequent to the filing of a legal action.

The majority emphasized that the Department of Insurance has specific authority under the Indiana Insurance Law[33] to order an insurance company to discontinue improper or unsafe practices, and to bring judicial actions against the company, its officers, and agents to obtain compliance.[34] Refusal or inability to return to sound business practices can result in a take-over of the property and business of the insurance company by the Department of Insurance for purposes of rehabilitation.[35] In the event of such a takeover, the Insurance Law provides that the Department of Insurance can bring actions against directors, officers, owners, and agents of the company to enforce claims vested in the company, its shareholders, members, policyholders, or creditors.[36] Thus, the shareholders of Great Fidelity were not without protection, but any malfeasance by Great Fidelity's officials or by Southern Securities that injured Great Fidelity could only be remedied by the Department of Insurance and not in a derivative action. Relying on *Sacks v. American Fletcher National Bank & Trust Co.*,[37] the supreme court ruled that the entire derivative action failed, even as to Southern Securities, when Great Fidelity could not be joined as a party defendant.

The second issue before the court was the propriety of the mandate action for the production of the shareholder lists. Plaintiffs apparently proceeded under the provision of the Indiana General Corporation Act[38] requiring Indiana corporations to keep books and records, including shareholder lists, and to make such records and lists available for inspection by shareholders for "proper purposes."[39] The majority noted that insurance companies

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[32]231 Ind. 94, 106 N.E.2d 924 (1952).

[33]IND. CODE §§ 27-1-1-1 to -22-24 (1971).

[34]*Id.* § 27-1-3-19.

[35]*Id.* § 27-1-4-1. *See* Department of Ins. v. Travelers Assur. Co., 115 Ind. App. 285, 58 N.E.2d 761 (1945).

[36]IND. CODE § 27-1-4-21 (1971).

[37]279 N.E.2d 807 (Ind. 1972). *See* discussion of the *Sacks* case at p. 77 *supra*.

[38]IND. CODE §§ 23-1-1-1 to -12-6 (1971).

[39]*Id.* § 23-1-2-14.

are specifically excluded from the General Corporation Act[40] and that the comparable provision in the Indiana Insurance Law did not require that shareholder lists be open for inspection.[41]

If this omission was considered an obstacle to inspection of the lists, it was more apparent than real because the court recognized that the failure to specify shareholder inspection rights in the pertinent statute does not necessarily deny or limit those rights.[42] This is not to say that a shareholder seeking a shareholder list of an insurance company has no problems. As with general corporations, the issue is not so much the right to inspect as it is the recourse available when the corporation denies the right. It is well established that mandamus action is appropriate to test such a refusal by a general corporation,[43] but the majority, consistent with its resolution of the derivative action issue, held that it is for the Department of Insurance to decide whether or not the shareholder wishes to see the records for a "proper purpose."[44]

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[40]*Id.* § 23-1-2-1.

[41]*Id.* § 27-1-7-16.

[42]For authorities on this point and for general discussions of shareholder inspection rights, see 5 FLETCHER § 2213; HENN § 199; LATTIN § 88; 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 52 (1971); Note, *Shareholders' Right to Inspection of Corporate Stock Ledger*, 4 CONN. L. REV. 707 (1972); Annot., 15 A.L.R.2d 11 (1951).

[43]Charles Hegewald Co. v. State *ex rel.* Hegewald, 196 Ind. 600, 149 N.E. 170 (1925). *See also* Indianapolis St. Ry. v. State *ex rel.* Cohen, 203 Ind. 534, 181 N.E. 365 (1932); S.F. Bowser & Co. v. State *ex rel.* Hines, 192 Ind. 462, 137 N.E. 57 (1922).

[44]The majority cited the *Hegewald* case for this proposition. The *Hegewald* case did not refer to "proper purpose" in so many words but rather formulated the test that a shareholder is entitled to inspect books, records, and shareholder lists when the "purpose is germane to his interest as [a] stockholder," 196 Ind. at 605, 149 NE. at 173, and "the privilege is sought in good faith for the protection of the interests of the corporation or in his own interests as a stockholder." *Id.*

Of equal importance to the "proper purpose" test is the burden of proof. Indiana is in accord with the jurisdictions that require the corporation to prove that the shareholder does not have a "proper purpose." Indianapolis St. Ry. v. State *ex rel.* Cohen, 203 Ind. 534, 181 N.E. 365 (1932). *See* Note, *The Burden of Proof as to the Proper Purpose Qualification of the Right of Shareholders to Inspect The Corporate Books and Records in Ohio*, 24 U. CIN. L. REV. 556 (1955). *See generally* authorities cited note 42 *supra*. Although the court is silent on this point, presumably the common law and statutory standards applicable to general corporations will obtain with respect to insurance companies.

The majority appeared to be unmindful of a distinction made in recent years between the right to inspect corporate books and records and the right to inspect shareholder lists. Generally, fewer restrictions are now imposed on the right to inspect shareholder lists than the right to inspect corporate books and records. The distinction recognizes that there is less opportunity to abuse information obtained from shareholder lists, in contrast to books and records, and that inspection of such lists does not result in as much inconvenience to the continued operation of the corportion.[45] Of course, it must be recognized that the need for shareholders to personally supervise the management of their investment is not as compelling with insurance companies as with general corporations because the former are subject to substantial regulation and control by the Department of Insurance.[46]

Plaintiffs were also denied access to the shareholder lists of Great Fidelity's parent, Southern Securities. Again the majority concluded that the Department had jurisdiction over the matter even though Southern Securities was not an insurance company. The court's reasoning was threefold. First, the Department *must* necessarily have control over a parent of an insurance company with respect to business with the subsidiary; second, the policy of Indiana Code section 27-1-20-23 would be thwarted if actions could be maintained against insurance companies indirectly when they could not be maintained directly; and third, plaintiffs admittedly were seeking control of Great Fidelity and Southern Securities through a proxy contest without having obtained the consent of the Department as required by Indiana Code section 27-1-23-2.[47] Concluding that the De-

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[45]Durnin v. Allentown Fed. Sav. & Loan Ass'n, 218 F. Supp. 716, 718 (E.D. Pa. 1963). For a recent discussion of this trend, see Note, *Shareholders' Right to Inspection of Corporate Stock Ledger*, 4 CONN. L. REV. 707, 710-13 (1972). *See generally* HENN § 199; LATTIN § 88.

[46]IND. CODE §§ 27-1-1-1 to -22-24 (1971). *But see* Orloff v. Cosmopolitan Mut. Ins. Co., 31 App. Div. 2d 263, 296 N.Y.S.2d 801 (1969).

[47]IND. CODE §§ 27-1-23-1 to -13 (1971). Section 27-1-23-2 provides in part:

> [N]o person shall enter into an agreement to acquire control of a domestic insurer or of any corporation controlling a domestic insurer unless, at the time any such offer, request, or invitation is made or any such agreement is entered into, or prior to the acquisition of such securities if no offer or agreement is involved, such person has filed with the commissioner and has sent to such insurer and any such controlling corporation a statement containing the information required by this section and such offer, request, invitation, agreement or acquisition has been approved by the commissioner in the manner hereinafter prescribed.

partment of Insurance had sole jurisdiction in the matter, the majority made the lower court's writ of prohibition permanent and mandated the circuit court to grant relators' motions to dismiss.

The dissenting justices recognized that Indiana Code section 27-1-20-23 bars, in effect, suits seeking "broad, equitable court orders, judgments and decrees, the effect of which would be to destroy or substantially impair the ability of an insurance company to continue operating as an ongoing business."[48] However, because the statute focused on remedies and not jurisdiction, they construed it as not prohibiting actions that would not materially disrupt the operations of an insurance company or would only do so indirectly. A mandate order directing that a shareholder list be made available to a shareholder for a proper purpose was clearly in the nondisruptive category to the dissenters.[49]

As to Southern Securities the dissenters conceded that, in part, the derivative suit requested remedies prohibited by Indiana Code section 27-1-20-23, and that, to the extent of the statutory prohibition, the trial court had no jurisdiction. However, since Southern Securities was not an insurance company as such, although it owned a majority of Great Fidelity's stock, not all orders would be barred by the statute.[50] Citing *State ex rel. Mid-West Insurance Co. v. Superior Court,*[51] as did the majority, the dissenting justices asserted that the circuit court had jurisdiction over suits requesting both prohibited and permitted remedies, as long as the prohibited remedies were denied. Consequently, they concluded that the majority erred in mandating the dismissal of the entire suit.[52]

The majority appears to have stretched the provision to some degree. Merely obtaining a shareholder list to obtain information is not tantamount to entering into agreements to acquire control of the company through the tender offers or exchange offers which are to be contemplated by the provision. Of course, the court was probably right in anticipating that eventually a transaction clearly encompassed in the section would arise.

[48]288 N.E.2d at 147. The dissenters, interestingly, did not point out that Lowery v. State Life Ins. Co., 153 Ind. 100, 54 N.E. 442 (1899), relied on by the majority, clearly involved direct interference with the operation of the company and not merely the production of a shareholder list.

[49]288 N.E.2d at 148.

[50]State *ex rel.* Meade v. Marion Superior Court, 242 Ind. 22, 174 N.E.2d 208 (1961). Specifically, plaintiff's request that the annual meeting of Great Fidelity be restrained was categorized as a prohibited remedy.

[51]231 Ind. 94, 106 N.E.2d 924 (1952).

[52]288 N.E.2d at 148-49.

C. Receivers

Receivership was also the issue in the Indiana Supreme Court's decision in *Inter-City Contractors Service, Inc. v. Jolley.*[53] More specifically, the court had to judge the propriety of an order of the Superior Court of Lake County appointing a receiver for Inter-City without notice. The complaint filed by appellee Jolley sought damages for an alleged breach of a merger agreement and requested the appointment of a receiver for the corporation without notice. The trial court appointed a receiver without affording Inter-City an opportunity to be heard. After Inter-City's motion to vacate the trial court order was denied, it perfected an appeal from the trial court's ruling.[54] The supreme court, per Justice Givan, held that the facts alleged in Jolley's complaint were not sufficient to justify the appointment of the receiver and reversed and remanded the judgment with instructions to vacate the appointment order. The court agreed with Inter-City's contention that Jolley had not satisfied the requirements of section 34-1-12-9 of the Indiana Code, which prohibits the appointment of receivers without notice "except upon sufficient cause shown by affidavit." The statute is silent as to what constitutes "sufficient cause," but the elements have been established by several supreme court decisions, primarily *State ex rel. Red Dragon Diner v. Superior Court*[55] and *Albert Johann & Sons v. Berges.*[56]

Johann, the leading decision, clearly outlined the foundational showing required to warrant summarily wresting a person's property from him by the appointment of a receiver without the opportunity to be heard in defense. *Johann,* consolidating several earlier rulings into one pleading requirement, established that the appointment of a receiver without notice is appropriate only when a verified complaint or other form of affidavit affirmatively shows: (1) that plaintiff will probably prevail in the action, (2) that there exists cause for the appointment without notice, and (3) that plaintiff's rights cannot adequately be protected by a restraining order or other remedy and, if this is shown, that the emergency necessitating the appointment could not have been

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[53]277 N.E.2d 158 (Ind. 1972).

[54]IND. CODE § 34-1-12-10 (1971) provides for direct interlocutory appeal to the supreme court from decisions appointing or refusing to appoint a receiver for the stay of the receiver's authority until the final determination of such appeal.

[55]239 Ind. 384, 158 N.E.2d 164 (1959).

[56]238 Ind. 265, 150 N.E.2d 568 (1958).

anticipated in time to give notice or that waste, destruction, or loss is threatened, and that delay until notice can be given would defeat the object of the suit.[57]

The court in *Red Dragon Diner* emphasized that the complaint requesting receivership must contain specific facts to establish the ultimate facts as required under *Johann*. Mere conclusions do not suffice.[58] It was this latter requirement that proved fatal to Jolley's case in *Inter-City*. The supreme court reviewed the complaint, and concluded that the allegations essentially contending that Inter-City's financial condition was so precarious that irreparable damage would result if a receiver was not appointed were mere conclusions and, not being supported by specific statements of facts, were insufficient to sustain the order under Indiana Code section 34-1-12-9.[59]

D. Record Ownership and Transfer of Shares

A dispute over the record ownership of corporate stock was the issue in *Traylor v. By-Pass 46 Steak House, Inc.*[60] The Indiana Supreme Court affirmed an order of the Superior Court of Vanderburgh County granting temporary injunctive relief in actions brought by the officers and directors of five corporations seeking to regain control over the business affairs of the corporations from defendant-appellants Traylor and Property Developers, Inc. Plaintiffs also sought the records, accounts, and documents of the corporations in defendants' possession and an accounting for the period of time during which they controlled the corporations.[61]

How Traylor, who was a shareholder of the various corporate plaintiffs but not an officer or director of any of them, gained dominion and control over the books, records, and management

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[57] *Id.* at 268, 150 N.E.2d at 569-70. *See* Fagan v. Clark, 238 Ind. 22, 148 N.E.2d 407 (1958); Morris v. Nixon, 223 Ind. 530, 62 N.E.2d 772 (1945); Tormohlen v. Tormohlen, 210 Ind. 328, 1 N.E.2d 596 (1936). For a discussion of the reasons for appointing receivers, see HENN § 375.

[58] 239 Ind. at 386, 158 N.E.2d at 165.

[59] 277 N.E.2d at 160. Appellee was not alone in failing to secure the appointment of a receiver without notice. *Johann* is replete with cases in which such appointments were set aside.

[60] 285 N.E.2d 820 (Ind. 1972).

[61] *Id.* at 820-21. Appellees were required to post bond of $60,000 as security for costs and damages under Indiana Rules of Trial Procedure 65(C).

was not disclosed in the opinion.[62] But it was clear that the five appellee corporations, through their officers and directors who were parties to the suit, had refused Traylor's request that the shares standing in his name be transferred to Property Developers, Inc.[63]

Appellants made a two-pronged attack on the order of the superior court and contended that: (1) the corporation had "failed to follow the law" by refusing to transfer the shares on the corporate books, and (2) plaintiffs, because they had refused to transfer the shares, were not entitled to the extraordinary remedy of injunctive relief under the equitable "clean hands" doctrine.[64] The supreme court did not really separate the two issues other than to note that the individual appellees were the duly acting officers and directors of the corporations "and as such are entitled to control the business affairs and assets of the corporations" as provided by the Indiana General Corporation Act.[65] This is unassailable as a general proposition,[66] but there are exceptions recognized in both the statutes and judicial decisions. For example, the General Corporation Act provides that the "power to make, alter, amend or repeal the by-laws of a corporation" is vested in the board of directors unless "otherwise provided in the articles of incorporation."[67] Thus, shareholders can reserve a power ordinarily exercised by the directors of a corporation. Furthermore, there is the now generally accepted concept that shareholders of

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[62]285 N.E.2d at 821.

[63]IND. CODE § 23-1-2-6(g) (1971) provides that the bylaws of a corporation can regulate the manner in which shares are transferable. Another shareholder of one of the corporations and another shareholder of two of them also attempted, without success, to have their shares transferred to Property Developers, Inc. For a general discussion of record ownership and the procedures for transfer of ownership on the share ledgers of the corporation, see 12 FLETCHER § 5492; HENN §§ 176-77; LATTIN § 141.

[64]285 N.E.2d at 821.

[65]IND. CODE § 23-7-1.1-16 (1971). Since that particular provision relates to the incorporation of not-for-profit corporations, the citation apparently is in error. Presumably the court was referring to section 23-1-2-11(a) which provides that "business of every corporation shall be managed by a board of directors." There is no indication that the corporations were anything other than for-profit corporations.

[66]*Id.* § 23-1-2-11(a). National State Bank v. Sanford Fork & Tool Co., 157 Ind. 10, 60 N.E. 699 (1901); National State Bank v. Vigo County Nat'l Bank, 141 Ind. 534, 42 N.E. 924 (1895). *See* 3 FLETCHER § 990; HENN § 207, at 416; LATTIN § 71; 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 33 (1971).

[67]IND. CODE § 23-1-2-8 (1971).

close corporations can agree among themselves to limit the board of directors, and reserve more authority to themselves than is normally contemplated by the corporation act of jurisdiction, provided that the departure from the corporate norm is not excessive and the interests of creditors or minority shareholders are not jeopardized.[68]

The key question for the supreme court was whether or not plaintiffs' refusal to transfer the Traylor shares and the shares of the other two shareholders complied with the equitable maxim that one who seeks equity must do equity.[69] The court construed that doctrine as requiring intentional or wilful misconduct, and not mere negligence, to bar a plaintiff from otherwise proper equitable relief.[70] It impliedly recognized that a refusal to transfer shares by corporate officers upon request of a shareholder could, under some circumstances, make the officers guilty of "unclean hands." However, the court concluded that the record in this case indicated there was litigation in another tribunal which disputed defendants' ownership of the shares of the five corporations, and hence the refusal was not such a disregard of defendants' rights as to justify application of the doctrine.

Defendants did not seek resolution of the stock ownership dispute in this proceeding, but rather asserted the issue of the ownership only as a defense to the equitable action. This contention was summarily dismissed with the court concluding that the corporate officers were entitled to refuse to transfer the shares until the ownership issue was completely resolved. Even if it was ultimately determined that defendants were entitled to the share transfers, the court felt that the refusal by the plaintiffs would be at worst negligence or a misapprehension of their legal rights. Such conduct could not reasonably be considered a "wilful disregard of the right of appellants,"[71] which would justify denying plaintiffs'

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[68] *See* Galler v. Galler, 32 Ill. 2d 16, 203 N.E.2d 577 (1964); Katcher v. Ohsman, 26 N.J. Super 28, 97 A.2d 180 (1953); Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936). *See generally* HENN § 213; LATTIN § 95; 1 F. O'NEAL, CLOSE CORPORATIONS §§ 5.16-.17 (1958). *See* Delaney, *The Corporate Director: Can His Hands Be Tied in Advance?*, 50 COLUM. L. REV. 52 (1950); Comment, *"Shareholder Agreements" and the Statutory Norm*, 43 CORNELL L.Q. 68 (1957). *Cf.* Benner-Corydell Lumber Co. v. Indiana Unemployment Comp. Bd., 218 Ind. 20, 29 N.E.2d 776, *cert. denied*, 312 U.S. 698 (1940).

[69] 285 N.E.2d at 822. *See* Ferguson v. Boyd, 169 Ind. 537, 81 N.E. 71 (1907).

[70] 285 N.E.2d at 822.

[71] *Id.*

equitable recourse to regain control of the corporate affairs from defendants and the return of the books and records, and to obtain the requested accounting.

E. Ownership and Management of Close Corporations

A falling out among family members over the ownership and control of a close corporation culminated in the decision of the court of appeals in *Grothe v. Herschbach.*[72] The issue on appeal was the propriety of a preliminary injunction entered by the Circuit Court of Jasper County, in a consolidated action,[73] restraining certain corporate claimants from interfering with the operation of the corporation by the president and chief executive officer. The circuit court ruled that the president, Henry Herschbach, had the sole right to draw checks upon the corporation's bank account, and required the president's son to deliver the key to a safe deposit box containing some assets of the corporation.

The court of appeals affirmed the preliminary injunction, which essentially preserved the status quo pending a decision on the merits and held that on the record the trial court had not abused its discretion in granting injunctive relief.[74] The dispute centered around the consequences of a special meeting held on May 11, 1971, particularly as to who was entitled to vote 1299 of the 2000 issued and outstanding shares of the corporation. The record showed that the stock transfer book indicated that the 1299 shares

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[72]286 N.E.2d 868 (Ind. Ct. App. 1972).

[73]As often occurs when discord reigns in family corporations, there was a proliferation of law suits, filings and hearings. The actions involved in the instant case were initiated in 1970 when Jack and Henryelta Herschbach Grothe, the son and daughter of the founder (or one of the co-founders) of an automobile dealership, filed an action to have their father Henry Herschbach and his second wife removed as officers of the corporation; for the appointment of a receiver and for an unspecified permanent injunction. The individual defendants, the corporate trustee under a testamentary trust established by plaintiffs' mother, and the corporation filed a counter complaint. The counter defendants responded with another complaint seeking injunctive and monetary relief against the counter claimants. This action was later consolidated with the initial litigation. The son Jack had also filed suits to have a trust which owned 1299 of the 2000 issued and outstanding shares of the corporation invalidated. The father, who was over 80 when the case was decided, was the trustee. Neither of those cases had been resolved at the time the order in issue was entered. *Id.* at 869-70, 873.

[74]*See* IND. R. TR. P. 65; Public Serv. Comm'n v. New York Cent. R.R., 247 Ind. 411, 216 N.E.2d 716 (1966); Indiana Annual Conference Corp. v. Lemon, 235 Ind. 163, 131 N.E.2d 780 (1956). *See also* Public Serv. Comm'n v. Indianapolis Rys. 225 Ind. 30, 72 N.E.2d 434 (1947).

were owned by Henry Herschbach as trustee under a trust created on August 17, 1965.[75] The Indiana General Corporation Act provides that a corporation need only look to its stock transfer book to ascertain the shareholders entitled to vote at shareholder meetings.[76] The court did not, however, rely solely on the record ownership in upholding the injunction. Rather, it examined the trial record and concluded that Henry Herschbach was at least the de facto president and director of the corporation and hence was entitled to preliminarily enjoin pretenders to his office.[77] In upholding Henry Herschbach's claim, the court relied on *Ziffrin v. Ziffrin Truck Lines, Inc.*,[78] which in turn applied the rule of *Schepp v. Evansville Television, Inc.*[79]

In *Ziffrin*, the Indiana Supreme Court held that the evidence sustained the lower court's finding that the board of directors of the truck company was in possession of the corporate "offices, books, bank accounts and other physical properties."[80] Consequently, the board members were de facto officers of the corporation with sufficient color of title to authorize the corporation to bring an action to enjoin other claimants from acting as officers until their entitlement was established by law. The *Schepp* court, in expounding on the rights of incumbent office holders, phrased the pertinent principle as follows:

> The rule is well settled that a claimant to an office may be enjoined by one occupying the office under a claim

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[75]286 N.E.2d at 877. The 1299 shares had previously been owned by the president's son, Jack Herschbach.

[76]IND. CODE § 23-1-2-9(h) (1971). *See* State *ex rel.* Breger v. Rusche, 219 Ind. 559, 39 N.E.2d 433 (1942). Indiana is in accord with the prevailing view in this respect. *See* 5 FLETCHER § 2033; HENN § 176, at 328; LATTIN § 89.

[77]286 N.E.2d at 873-74. At the May 11, 1971, meeting two conflicting sets of minutes were prepared. One set, prepared at the instance of Henry Herschbach disclosed that the shareholders took no action to remove officers or directors and elected no new directors. The second set, prepared at the instance of the claimants, indicated that Jack Herschbach, the president's son, purported to vote the 1299 shares for himself and 640 shares as proxy for his sister, and elected his wife, his sister and the former officer of the corporation as the three directors of the corporation. His wife was then purportedly elected president. She spent no time on the premises of the corporation and her only act as "president" was to direct a letter to the bank asserting her claim to the office and warning them not to honor the signature of Henry Herschbach.

[78]239 Ind. 468, 158 N.E.2d 793 (1959).

[79]236 Ind. 472, 141 N.E.2d 437 (1957).

[80]239 Ind. at 472, 158 N.E.2d at 795.

> of right until the former shall have established his title in an action at law. Thus will equity protect the *possession* of the incumbent from any unlawful intrusion.[81]

It is well-established that to determine the title of officers or directors or to test the validity of an election of corporate officers, *quo warranto* actions, or information in the nature of *quo warranto*, is the proper remedy.[82] Hence, injunctive relief is merely a device to maintain the status quo until the title issue is resolved.

The primary element of the rule protecting possession of corporate office is that the incumbent acting as de facto officer must be doing so under color of title. The Seventh Circuit in *In re Bankers Trust*[83] cited *Schepp* as being in accord with the proposition that "color of right or title merely means 'authority derived from an election or appointment, however irregular or informal, so that the incumbent not be a mere volunteer.' "[84] The authorities generally specify that there must be an exercise of the assumed authority before the de facto doctrine applies.[85]

The *Herschbach* opinion did not make it absolutely clear that Henry Herschbach took office because of an election. It is not unlikely that he did, since he was the only person who had acted as president of the corporation for forty years. In essence, the court gave great weight to Herschbach's past performance of duties and possession of corporate property prior to the contested meeting in determining his de facto status for purposes of passing on the preliminary injunction.[86]

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[81]236 Ind. at 481-82, 141 N.E.2d at 441 (emphasis added). *See* Felker v. Caldwell, 188 Ind. 364, 123 N.E. 794 (1919); Carmel Natural Gas & Improvement Co. v. Small, 150 Ind. 427, 47 N.E. 11 (1897).

[82]Smith v. Bank of State of Indiana, 18 Ind. 327 (1862); 2 FLETCHER § 387; HENN §§ 206, 222; LATTIN § 76.

[83]403 F.2d 16 (7th Cir. 1968).

[84]*Id.* at 20 *quoting from* 2 FLETCHER § 374, at 203. *See also* HENN § 206, at 222; LATTIN § 76.

[85]2 FLETCHER § 374; HENN §§ 206-22; LATTIN § 76.

[86]286 N.E.2d at 877. Although it did not appear to be in issue, it should be noted that there is some authority that an officer elected by an illegally constituted board of directors is without color of right or title and is not entitled to the salary provided for him even if he renders services in good faith believing he has de jure status. Waterman v. Chicago & I.R.R., 29 N.E. 689 (1892). Lattin criticizes this as a "dubious and unjust principle." LATTIN § 77, at 264.

The court distinguished *Hutton v. School City*,[87] relied on by the Herschbach children. In *Hutton* the court stated that:

> The general rule is that mandatory injunctions will not issue to deprive a person of property of which he is in possession under claim of ownership, until after the cause has been fully heard, when it comes up for final decree. And in the absence of extraordinary circumstances, of a character not shown to exist in the case at bar, such an order should not issue.[88]

The reasoning behind asserting that *Hutton* supported the children's position is not clear since there was little doubt that Henry Herschbach, and not the children, had possession and control of the corporation except to the extent that it had been usurped by the children. Perhaps it was merely cited for the proposition that courts should exercise judicial restraint in issuing mandatory injunctions, particularly since Henry Herschbach's daughter-in-law at least claimed that she had been elected president at the May 11th meeting.[89]

In addition, the court of appeals concluded that Henry Herschbach's petition for preliminary injunctive relief demonstrated an "impending injury" or "urgent necessity" which demanded the immediate interposition of injunction within the rule of *Public Service Commission v. New York Central Railroad.*[90] Henry Herschbach's age, the claimants impeding of the normal operation of the corporation, including the payment of bills and the purchase of automobiles, and their asserted ownership claim to substantial bank accounts and negotiables satisfied this requirement with no difficulty.[91]

F. Earnings and Dividends

The Appellate Court of the State of Illinois applied Indiana law in *Kern v. Chicago & Eastern Illinois Railroad*,[92] an action seek-

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[87]194 Ind. 212, 142 N.E. 427 (1924).

[88]*Id.* at 219, 142 N.E. at 430.

[89]*See* note 77 *supra.*

[90]247 Ind. 411, 421, 216 N.E.2d 716, 723 (1966).

[91]286 N.E.2d at 871, 874.

[92]285 N.E.2d 501 (Ill. App. 1972). The court held that the law of Indiana, the state of incorporation, applied. *See* Guttmann v. Illinois Cent. R.R., 91 F. Supp. 285 (E.D.N.Y. 1950), *aff'd*, 189 F.2d 927 (2d Cir. 1951).

ing to compel the payment of a dividend on preferred stock for the year 1959. The issue on appeal was the correctness of the C. & E.I.'s computations supporting its conclusion that there were no net earnings available for dividends on the Class A preferred shares.

The C. & E.I. was incorporated in Indiana in 1939 pursuant to a reorganization proceeding supervised by the Interstate Commerce Commission. The reorganization provided for a Class A preferred stock with a par value of forty dollars per share and a maximum annual dividend rate of two dollars. The dividends were cumulative to the extent earned.[93] During March 1965, the C. & E.I. made an exchange offer to Class A preferred shareholders offering forty dollars in C. & E.I. common shares plus six dollars in dividends that had been accrued and unpaid on the Class A shares. The Class A shares that were not exchanged pursuant to the offer were called for redemption in July 1965 at a price of $47.17.[94] The terms of both the exchange offer and the redemption notice stated that no dividends for the year 1959 had been accrued and unpaid on the Class A shares. In fact, the railroad's records indicated a deficiency in net earnings available for dividends in 1959. Plaintiffs continued to hold their shares and had neither exchanged them nor delivered them upon redemption.[95]

Plaintiffs urged two theories in support of their claim for the two dollars dividend: (1) that the undistributed 1959 earnings of a C. & E.I. wholly owned subsidiary, Chicago Heights Terminal Transfer Railroad Co. (C.H.T.T.), should have been included in the

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[93]The C. & E.I. articles of incorporation provided that:

> If in any year there shall not be net earnings available for dividends, or if the amount of net earnings available . . . shall be less than the maximum dividend requirement . . . the deficiency shall not be made good in any subsequent year, nor shall any dividends accumulate with respect thereto.

285 N.E.2d at 502.

As Henn points out, "cumulative-to-the-extent-earned" preferred stock is a hybrid variety of dividend preference "under which unpaid dividends accumulate during past fiscal periods only to the extent that there were then funds legally available to pay such dividends." HENN § 124, at 209. *See also id.* §§ 324-25.

[94]The redemption price represented the $40 par value of the share plus $7.17 in dividends which were then "accrued and unpaid."

[95]285 N.E.2d at 503. The suit claimed dividends for persons who had exchanged or who had had their Class A shares redeemed or who, like plaintiffs, continued to hold them. *Id.* at 502.

C. & E.I. income accounts;[96] and (2) that Illinois real estate tax refunds for the year 1959 were credited to the income accounts of the years received whereas the accounts for the year 1959 should have been reopened and adjusted.[97]

Plaintiffs' first theory required an interpretation of C. & E.I.'s articles of incorporation. Indiana, as the court noted, is in accord with most jurisdictions and recognizes that the rights of preferred shareholders are contractual in nature with the articles of incorporation serving as the contract.[98] The pertinent provisions of the C. & E.I. articles provided that "net earnings available for dividends" to Class A shareholders were the same as "income available for contingent charges"[99] as computed in accordance with the 1939 Uniform System of Accounts for railroads adopted by the Interstate Commerce Commission.[100] The Uniform System of Accounts in turn provided that:

> Income accounts are those designed to show, as nearly as practicable, for each fiscal period . . . the returns accrued upon investments. . . . The net balance of income (or loss) shall be carried to Profit and Loss.[101]

The crux of the decision was whether the undistributed earnings of C.H.T.T. had accrued to C. & E.I., which in turn depended on whether or not the "corporate fiction" of C.H.T.T. would be disregarded. The appellate court upheld the circuit court's conclusion that C.H.T.T. had been operated as a separate entity from C. & E.I. in 1959, and, consequently, the only "return accrued upon investment" was the $300,000 dividend that had been declared in 1959 and not the undistributed income.[102] This result reflects the

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[96]The C.H.T.T. had net earnings of $392,193 for 1959 of which $300,000 was paid out as a dividend to the parent corporation. Thus sum was included in C. & E.I.'s income accounts for 1959. The balance of $92,193 in undistributed earnings was not considered by C. & E.I. as income nor as net earnings available for dividends. *Id.* at 503.

[97]It was stipulated that the net tax refunds were sufficient to pay the $2 dividend for 1959. *Id.* at 505.

[98]Rubens v. Marion-Washington Realty Corp., 116 Ind. App. 55, 59 N.E.2d 907 (1945). *See* HENN § 124; LATTIN §§ 129-30.

[99]285 N.E.2d at 503. Income available for contingent charges was defined as income less fixed charges less certain specified sums.

[100]ICC Reg. C, 49 C.F.R. § 514 (1972).

[101]*Id.*

[102]285 N.E.2d at 504.

well-established rule that there is no "dividend" nor is there a right for a shareholder to demand or receive a dividend until it has been declared by proper action of the corporation's board of directors,[103] except under extraordinary circumstances such as refusing to declare preferred dividends when funds are legally available and the refusal indicates bad faith or oppressive conduct on the part of the board. In such cases equity will compel the board to act.[104]

The Illinois court appeared to recognize that a contrary result would be appropriate if the facts justified disregarding the corporate fiction of C.H.T.T. and treating the two entities as one. However, there was little doubt that C. & E.I. had maintained its wholly owned subsidiary as a separate entity. In fact, support for the conclusion was drawn from C. & E.I.'s efforts to effect a merger of the two companies. The efforts failed when the ICC refused to approve the proposals and specified that C.H.T.T. was to be maintained as a distinct corporate entity.[105] Thus, a conclusion that the two corporations were in fact one would require the conclusion that C. & E.I. had violated the Interstate Commerce Act.[106] The trial court record also indicated that the Director of Accounts of the ICC had advised C. & E.I. that the Uniform System of Accounts did not require the transfer of earnings from a subsidiary to its parent.[107] The conclusion was further buttressed by affidavits showing that C.H.T.T. had always maintained separate books and records from its parent.[108]

The second theory of plaintiffs also failed to persuade the appellate court. Again it was the Director of the Bureau of Ac-

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[103]Rubens v. Marion-Washington Realty Corp., 116 Ind. App. 55, 63, 59 N.E.2d 907, 910 (1945); *See also* Franklin County Distrib. Co. v. C.I.R.R., 125 F.2d 800, 805 (6th Cir. 1942); Cintas v. American Car & Foundry Co., 131 N.J. Eq. 419, 25 A.2d 418, 422 (1942); HENN §§ 327-28; LATTIN § 146.

[104]W.Q. O'Neall Co. v. O'Neall, 108 Ind. App. 116, 25 N.E.2d 656 (1940). *See* Rubens v. Marion-Washington Realty Corp., 116 Ind. App. 55, 59 N.E.2d 907 (1945); Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919); HENN § 328.

[105]Chicago & Ill. R.R. Merger, 312 I.C.C. 564 (1961).

[106]49 U.S.C. § 5(1) (1970). Courts are reluctant to disregard the corporate fiction when to do so will require a conclusion that the corporations have acted unlawfully. *See* Berkey v. Third Ave. Ry., 244 N.Y. 84, 155 N.E. 58 (1926) (Cardozo, J.).

[107]285 N.E.2d at 504. C. & E.I.'s independent auditor concurred in this judgment. *Id.*

[108]*Id.*

counts for the ICC that thwarted their efforts to establish that there were sufficient net earnings in 1959 to fund the Class A dividends. In this respect the record indicated that it would be inappropriate to reopen and adjust the accounts for 1959 "for the purpose of recording subsequent years transactions (the refunds). . . . Adjustments of this kind should be lodged in either current income or expense accounts of appropriate retained income accounts."[109] C. & E.I.'s auditors opined that the refunds should be credited to the retained earning account to preclude a material distortion of the income account.[110]

The court also rejected plaintiffs' contention that a provision in the articles providing that adjustments to "income accounts of prior years shall be treated as income items *for the year in which entered on the books*"[111] referred to the year of the original entry and held that the reference was to the year in which the adjusting entry was made. Thus, an express provision of the articles refuted plaintiffs' argument that prior year accounts were to be reopened.[112]

G. Statutory Developments

The 1973 Session of the Indiana General Assembly enacted several pieces of legislation significantly amending the Indiana General Corporation Act and the Indiana Insurance Law.[113]

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[109] *Id.* at 505.

[110] *Id.*

[111] *Id.* (emphasis in original).

[112] *Id.* at 505-06. In fact, the court noted that "net earnings available for dividends" in 1959 were enhanced by refunds received in 1959 from real estate taxes paid in prior years. In other words, plaintiffs perhaps should have taken pleasure from the fact that the deficiency in 1959 would have been greater if the accounts for prior years had been reopened.

[113] Other enactments by the General Assembly in the corporate area include: (1) Ind. Pub. L. No. 269 (April 12, 1973), which intriguingly amended IND. CODE § 27-1-2-2 (1971) to provide that the Indiana Insurance Law does not apply to not-for-profit corporations that pay death benefits to owners of valuable registered horses; (2) Ind. Pub. L. No. 248 (April 10, 1973), which amended IND. CODE § 23-7-1.1-7 (1971) to provide that loans to not-for-profit corporations by members can bear "reasonable interest at a rate not in excess of current market rates." The prior language limited interest rates to not in excess of 6% per annum. The amendment does not define "reasonable" or "current market rates" so it does present some potential construction problems. The legislature no doubt intended to liberalize the interest provision and the courts will probably interpret it accordingly. One possible guideline would be the interest rates given by comparable corporate

1. *Insurance Company Mergers and Consolidations*

The Indiana Insurance Law relating to mergers[114] and consolidations[115] of domestic insurance companies was amended[116] to bring it into substantial conformance with the merger and consolidation provisions of the Indiana General Corporation Act.[117]

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ventures in the regular bond or debenture market; (3) Ind. Pub. L. No. 64 (April 6, 1973), which amended the Public Service Commission Law, IND. CODE §§ 8-1-1-1 to -23-5 (1971) by adding a new chapter numbered 24 which eliminated the requirement that the Indiana Public Service Commission approve the issuance of securties of federally-regulated gas pipeline companies or the sale or other transfer of the facilities of such companies and exempted such companies from Commission regulation with respect to their securities; (4) Ind. Pub. L. No. 245 (April 16, 1973), which amended IND. CODE §§ 23-1-11-1 to -16 (1971) by adding a new section numbered 1.5, which provided that foreign financial institutions purchasing evidence of indebtedness from domestic investing or lending institutions are not for that reason alone "transacting business" in the state for purposes of qualification; (5) Ind. Pub. L. No. 266 (April 13, 1973), which amended IND. CODE § 26-1-8-102 (1971) and reduced the stock ownership requirement of "clearing corporations" from 100% to 90% provided that the remaining stock is owned by directors of such corporations and only to the extent such ownership is necessary to permit them to qualify as directors; (6) Ind. Pub. L. No. 277 (April 19, 1973), which amended IND. CODE § 27-1-13-3(2)(c) (1971) to permit casualty, fire, and marine insurance companies to invest in bonds, notes, or other evidence of indebtedness issued and guaranteed by a local governmental unit of a state, territory, or possession of the United States, the District of Columbia, or a province of the Dominion of Canada under certain conditions; (7) Ind. Pub. L. No. 279 (April 23, 1973), which amended IND. CODE §§ 27-6-8-17, -18 (1971) by extending from 90 days to 6 months the automatic stay of legal proceedings wherein an insolvent insurance company is a party or is required to defend a party, and to clearly require the liquidator or receiver of an insolvent insurance company to make records available to the Board of the Indiana Insurance Guarantee Association. The Association is responsible for the quick payment of claims against insolvent insurance companies and for the detection and prevention of such insolvencies.

[114]IND. CODE § 27-1-9-3(a)(3) (1971).

[115]*Id.* §§ 27-1-9-1 to -15.

[116]Ind. Pub. L. No. 272 (April 17, 1973). The Act was deemed an emergency measure and became effective upon passage.

[117]IND. CODE § 23-1-5-2(a)(3) (1971) (mergers); *id.* § 23-1-5-3(a)(3) (consolidations).

The Indiana Insurance Law and the General Corporation Act now comport with the approach to mergers and consolidations adopted by the drafters of the 1969 revision of the Model Business Corporation Act.

2 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71, 72 (1971). The prior Model Act provisions, 2 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 65, 66 (1960), like prior Indiana law, limited conversions to the shares, obligations, or other securities of the surviving or new corporation. This restriction was

The major revision was the addition of language permitting the agreement of merger or consolidation to provide for the conversion of the shares of participating stock corporations into something other than the "shares or other securities" of the surviving or new corporation. Conversions into such securities are still permitted, but the Insurance Law now provides that the shares of each party to a merger, other than the surviving corporation, and the shares of each party to a consolidation can be converted "in whole or in part, into cash, property, shares or obligations of any other corporation."[118]

The only significant difference remaining between the current merger and consolidation provisions of the Insurance Law and the General Corporation Act is that the Insurance Law merger provision still contains the phrase "other than the surviving corporation" as a limitation on its conversion authority.[119] It is unclear why this restrictive language was carried over from the previous merger provision. Since the term "merger" means the absorption of one or more corporations by an existing corporation which continues to survive, the phrase seems redundant.[120] If the shares of the "surviving corporation" are changed or converted, *i.e.* a new corporation is created,[121] then the fundamental corporate change is not a merger, but rather a consolidation. Perhaps the retention of the phrase can be explained as a legislative oversight. The General Corporation Act, prior to the 1969 amendment broadening the conversion provision of the merger section,[122] also contained the phrase. It was initially carried over into the 1969 amendment but eventually was deleted.[123] A similar deletion in section 27-1-9-3(a)(3) of the Insurance Law might be anticipated in the future.

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characterized as "needlessly restrictive and out of harmony with modern practices." 2 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71, 72, at 352 (1971).

[118]This is the language added to the consolidation provision, IND. CODE § 27-1-9-4(a)(3) (1971). The amendment to the merger provision, *id.* § 27-1-9-3(a)(3), was identical except that the word "other" before the word "corporation" was omitted. The same difference is found in the merger and consolidation provisions of the General Corporation Act.

[119]*Id.* § 27-1-9-3(a)(3).

[120]HENN § 346, at 713; LATTIN § 170, at 613. *See* 2 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71, 72 (1971). For an extensive bibliography on mergers and consolidations, see HENN § 346, at 713 n.1.

[121]HENN § 346, at 713; LATTIN § 170, at 613.

[122]IND. CODE § 23-1-5-2(a)(3) (1971).

[123]Ind. Pub. L. No. 179, § 2(a)(3) (Feb. 16, 1972).

The effect of the amendments, as they refer expressly to "cash, property, shares or obligations of other corporations," will be to increase the flexibility available in planning the merger or consolidation of Indiana insurance companies. For example, the shareholders of merged corporations are now permitted to receive securities of the surviving corporation's parent which might have marketability or other advantages over the shares, obligations or securities of the surviving corporation.

2. *Insurance Company Short Form Mergers*

Also adopted by the General Assembly was a new "short form" acquisition provision authorizing a parent corporation that owns (directly or indirectly) ninety-five per cent of the voting stock of a domestic insurance company to acquire the minority interests without the approval of the shareholders of either corporation.[124] The new provision, which applies to both foreign and domestic parent corporations, provides for the adoption of a plan of acquisition by the board of directors of the parent whereby the minority interests of the subsidiary will be acquired in exchange for the "shares or other securities of the parent corporation, or cash, other consideration, or any combination of the foregoing. . . ."[125]

Since insurance companies are involved, the merger plan requires approval by the Indiana Insurance Commissioner before it can become effective. Such approval is contingent on satisfying the Commissioner "that the terms and conditions of the plan of acquisition are fair and reasonable."[126] In this respect the enactment differs significantly from the short form merger provision of the Indiana General Corporation Act[127] and accords minority shareholders greater protection of their interests. The two acts

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[124]Ind. Pub. L. No. 278 (April 12, 1973). This was deemed an emergency measure and became effective immediately on passage. Specifically, this act amended IND. CODE §§ 27-3-1-1 to -2-9 (1971) by adding an additional chapter numbered 3.

[125]Ind. Pub. L. No. 278 (April 12, 1973). Interestingly, the exchange provision is less flexible than the amendments to the general merger and consolidation provisions of the Insurance Law which now permit the conversion of minority shares into shares of "other" corporations. *See* discussion of amended IND. CODE §§ 27-1-9-3(a)(3), -4(a)(3) (1971) p. 100 *supra*. The new provision is also more restrictive than the short form merger section of the General Corporation Act, IND. CODE § 23-1-5-8 (1971).

[126]Ind. Pub. L. No. 278 (April 12, 1973).

[127]IND. CODE § 23-1-5-8 (1971). For general discussions of short form mergers, some critical of the device, see 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 75, Annot. 2 (1971); HENN § 346, at 715 n.8; Note, *Elimination of*

also differ with respect to the procedures and methods for appraising the value of the shares of shareholders dissenting from the acquisition plan, and the consideration offered thereunder.[128]

Under the provisions of the new enactment, dissenting shareholders have thirty days after receipt of the plan, or a summary of it, to notify the company in writing of their dissent from the plan and to demand the "fair value . . . [of the voting stock] as of the day prior to the date on which the plan of acquisition was adopted by the board of directors of the parent corporation, excluding any appreciation or depreciation in anticipation of, or resulting from, that corporate action."[129] The Act further provides for judicial appraisal of the shares of the subsidiary if the shareholder does not agree with the value deemed fair by the subsidiary. Although the appraisal remedy has been criticized at times as having questionable value for shareholders of publicly held corporations,[130] it is certainly not inappropriate when minority shareholders have no established market through which they can dispose of their holdings.

Section 4 of the new act provides that the parent corporation and the now wholly-owned subsidiary insurance company shall be deemed separate and distinct corporations with neither "having any liability to the creditors, policy holders, if any, or shareholders of the other, notwithstanding any actions or omissions of the officers, directors or shareholders of either or both of the corporations."[131] This legislative restriction on disregarding the corporate fiction is also found in the provision relating to the exchange of insurance securities of other than ninety-five per cent owned subsidiaries.[132]

Minority Share Interests by Merger: A Dissent, 54 NW. U.L. REV. 629 (1959); Comment, *The Short Merger Statute*, 32 U. CHI. L. REV. 59 (1965). Although they have been attacked, short form merger statutes have been upheld as constitutional. Coyne v. Park & Tilford Distillers Corp., 37 Del. Ch. 558, 146 A.2d 785 (1958); Alpren v. Consolidated Edison Co., 168 Misc. 381, 5 N.Y.S.2d 254 (Sup. Ct. 1938).

[128]Ind. Pub. L. No. 278 (April 12, 1973).

[129]*Id.*

[130]*Compare* Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coher*, 72 YALE L.J. 223 (1962), *with* Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CALIF. L. REV. 1 (1969). *See also* Banks, *A Selective Inquiry into Judicial Stock Valuation*, 6 IND. L. REV. 19 (1972).

[131]Ind. Pub. L. No. 278 (April 12, 1973).

[132]IND. CODE § 27-3-1-7 (1971).

3. Corporate Fees

Of particular interest in the corporate area was the amendment to Indiana Code section 23-3-2-1[133] increasing fees for certain corporate activities effective May 1, 1973.[134] A fee schedule reflecting these increases is available from the Office of the Secretary of State of Indiana.

4. Indemnification of Corporate Personnel

The General Assembly altered in several respects the provisions of the Indiana General Corporation Act relating to the indemnification of corporate personnel against expenses incurred in defending liability claims and for insurance covering such claims.[135] It also extended similar protection to insurance corporation personnel by adding nearly identical language to the powers section of the Indiana Insurance Law.[136] The General Assembly extended the corporate power to indemnify corporate personnel and clearly authorized the purchase and maintenance of insurance on behalf of such persons against any liability asserted against or incurred by them even though the corporation itself might lack the power to indemnify them otherwise.

The first significant change effected by the legislation was the inclusion of past or present "employees and agents" among those persons who may be indemnified by the corporation or on whose behalf liability insurance may be obtained. Previously, only past or present "directors or officers" of the corporation were covered. In making this change, Indiana adopted the position of the drafters of the indemnification provision of the Model Busi-

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[133]Ind. Pub. L. No. 247 (April 17, 1973). This was deemed an emergency measure and became effective on May 1, 1973.

[134]There were also some minor style and form changes in the provisions of IND. CODE §§ 23-3-2-1 to -5 (1971). However, these have no substantive effect.

[135]*Id.* §§ 23-1-1-2(b)(9) to -2(b)(10), *as amended* Ind. Pub. L. No. 244 (April 10, 1973).

[136]*Id.* § 27-1-7-2(b)(8) to -2(b)(9), *as amended* Ind. Pub. L. No. 271 (April 13, 1973). Indiana Public Laws 244 and 271 were designated emergency measures and became effective immediately after passage. Since the language of the Insurance Law provisions is identical to the two relevant sections of the General Corporation Act (except for some minor differences required by the differences between insurance and general corporations) the discussion will focus on amended section 23-1-2-2(b)(9) and the new section 23-1-2-2(b)(10) of the General Corporation Act. The provisions authorize corporations

ness Corporation Act[137] and joined the minority of jurisdictions[138] recognizing the need to indemnify personnel below the top echelons of the corporate structure in order to attract and keep competent enployees.[139]

> to indemnify any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses reasonably incurred by him in connection with the defense of any action, suit or proceeding, civil or criminal, in which he is made or threatened to be made a party by reason of being or having been in any such capacity, or arising out of his status as such, except in relation to matters as to which he is adjudged in such action, suit or proceeding, civil or criminal, to be liable for negligence or misconduct in the performance of duty to the corporation: Provided, however, that such indemnification shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any provision of the articles of incorporation, by-laws, resolution, or other authorization heretofore or hereafter adopted, after notice, by a majority vote of all the voting shares then issued and outstanding; [and]
>
> . . . to "purchase" and "maintain" insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the "power to indemnify" him against such liability under the provisions of this section. . . .

Ind. Pub. L. No. 244, §§ 2(b)(9)-(10) (April 10, 1973); Ind. Pub. L. No. 271 §§ 2(b)(8)-(9) (April 13, 1973).

[137]1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5 (1971). The Annotation observes that the development of indemnification statutes was prompted by the decision in New York Dock Co. v. McCollom, 173 Misc. 105, 16 N.Y.S.2d 844 (Sup. Ct. 1939), which denied a common law right of indemnification. Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (1941); Mooney v. Willys-Overland Motors, Inc., 204 F.2d 888 (3d Cir. 1953).

[138]The Model Act Annotation lists Connecticut, Massachusetts, and Minnesota as authorizing indemnification of agents and employees as well as officers and directors. California, Ohio, Rhode Island, and South Carolina include employees in their statutes. Connecticut goes still further and protects shareholders of the corporation as does North Carolina under some circumstances.

[139]Recognized is a need for protection apart from whatever protection is enjoyed by them under the general principles of agency law. *See* HENN § 379, at 800 n.2; W. SEAVEY, LAW OF AGENCY § 168 (1964); RESTATEMENT (SECOND) OF AGENCY §§ 439-40 (1958).

A related change effected by the legislation was the extension of indemnification to persons serving, or who had served, as directors, officers, employees, or agents of another "corporation, partnership, joint venture, trust or other enterprise" if the person is or was serving at the request of the indemnifying corporation. The previous language of section 23-1-2-2(b)(9) encompassed only persons serving as "directors or officers" of other corporations. Thus while the old provision extended protection to persons serving in top managerial positions of corporations such as subsidiaries, the current provision recognizes that other forms of business enterprise beside the corporate are appropriate in many instances[140] and accordingly extends the indemnification power.

It should be pointed out that the former statutory provision did not *preclude* indemnification of employees or agents, or corporate personnel serving in other business enterprises. It specifically provided that the indemnification authority granted by the General Corporation Act was not "exclusive" and permitted indemnification pursuant to the "articles of incorporation, bylaws, resolution, or other authorization heretofor or hereafter adopted, after notice, by a majority vote of all the voting shares then issued and outstanding."[141] Consequently, the benefits of indemnification could be accorded by director or shareholder action in situations not encompassed within the provision itself, including those situations now covered by the amended provisions. The nonexclusive feature of most statutes has been criticized as lessening the protection given to the interests of the corporation's owners. Having the scope of indemnification specified in the General Corporation Act is a more satisfactory procedure because the limits of proper indemnification are set forth.[142]

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[140]For a general discussion of such other forms of doing business, see HENN §§ 16-76.

[141]IND. CODE § 23-1-2-2(b)(9) (1971). The Model Act indemnification provision is nonexclusive, as apparently are the statutes in the majority of jurisdictions. 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 225 (1971). *See* HENN § 379, at 806; LATTIN §§ 78, at 281, 114, at 449-50. *See also* L. RATNER, PROTECTING THE CORPORATE OFFICER AND DIRECTOR FROM LIABILITY (1970); Jervis, *Corporate Agreements to Pay Directors' Expenses in Stockholder Suits*, 40 COLUM. L. REV. 1192 (1940).

[142]*See* HENN §§ 379-80; LATTIN §§ 78, 114. It is important to note that there is authority cautioning against overreliance on such provisions when indemnification goes substantially beyond the statute or when it could be characterized as unjust or inequitable. Teren v. Howard, 322 F.2d 949 (9th Cir. 1963); *cf.* Koster v. Warren, 297 F.2d 419 (9th Cir. 1961). Another risk is that any bylaw or other provision concerning indemnification could be deemed, if poorly drafted, as restricting rather than expanding available

One change effected by the amendment that might be of questionable wisdom was the deletion of "actually" with respect to the expenses covered by the provision, leaving "reasonably incurred" as the only limit on the expenses covered. The problem is not that the standard of accounting has been reduced in fact, rather, it is that it might *appear* that the standard has been reduced. This appearance of a reduced standard could encourage a less careful attitude in defending claims or actions brought against corporate personnel. Of course, one argument in favor of deleting "actually" is that the statute now clearly permits the corporation to make advances to a covered person to finance his defense or to make payments directly to a third party such as an attorney rather than having the indemnified person pay the expense and in turn seek reimbursement. Unfortunately, the General Assembly did not take the opportunity to specify whether or not settlement expenses are covered.[143]

Another change according more protection to corporate personnel is the extension of the indemnification right to expenses incurred in defending claims or actions "arising out of his status" as an officer, director, employee, or agent. Previously, indemnification was limited to claims arising out of acts done in the person's capacity as an officer or director. Consequently, indemnification is now available in proper cases for third party actions.[144]

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indemnification. Essential Enterprises Corp. v. Dorsey Corp., 40 Del. Ch. 343, 182 A.2d 647 (1962). *See also* Loftin, *Indemnification of Corporate Executives*, 1 LIABILITIES OF CORPORATE OFFICES AND DIRECTORS 69 (1968).

[143]Some statutes specifically refer to settlements. *See* HENN § 380, at 811 nn.46-49. It is possible that settlements would be included as an expense "reasonably incurred" in defending a claim, HENN § 380, at 812. They might also be covered in a provision of the articles of incorporation, or the bylaws or otherwise as authorized by the nonexclusive proviso of IND. CODE § 23-1-2-2(9) (1971).

[144]*Cf.* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), in which the liability arose because the defendants were insiders, not because they were acting as officers or directors. *See* 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 219-20 (1971); Knepper, *Corporate Indemnification and Liability Insurance for Corporate Officers and Directors*, 25 SW. L.J. 240 (1971). However, it is unlikely that the defendants in *Texas Gulf Sulphur* would have been entitled to indemnification under the new Indiana statutory provision since they were deemed to have violated their duty to the corporation in using information that properly should have been used only for corporate purposes. *See* SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971); Diamond v. Oreamuno, 23 N.Y.2d 494, 248 N.E.2d 910 (1969).

The Indiana statute in this respect is not as generous as some, including the Model Act,[145] in that it permits indemnification "except in relation to matters as to which he is adjudged in such action, suit or proceeding, civil or criminal, to be liable for negligence or misconduct in the performance of duty to the corporation."[146]

The approach of the drafters of the Model Act is to permit indemnification of persons who have not been completely successful in their defenses if they have at least met prescribed standards. Typically the person entitled to indemnification must have "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful."[147] To prohibit wrongdoing directors from attempting to indemnify themselves for the expenses of their unsuccessful defenses, it is crucially important that there be an independent determination that indemnification is proper. The statutes have adopted several techniques to accomplish this, including advice of independent legal counsel, ratification by disinterested directors or the shareholders of the corporation, or order of the court hearing a derivative action.[148]

Separate and apart from the expansion of the corporate power to indemnify officers, directors and employees, Indiana Public Laws 244 and 271 added a new subsection to the general powers provisions of the General Corporation Act[149] and the Insurance Law[150] clearly authorizing the purchase by the corporation of liability insurance for corporate personnel. Although the *indemnification* provisions of the two Acts are not as liberal or as favorable to management as the indemnification provision of the Model Busi-

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[145]1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 224-37 (1971); HENN § 380.

[146]*See* note 25 *supra.*

[147]1 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 5(a)-(b), at 224 (1971). *See generally* HENN § 380, at 809-11. In this respect the business judgment rule has afforded a great deal of protection against liability for errors in conduct. *See* Freeman v. Hare & Chase, Inc., 16 Del. Ch. 207, 142 A. 793 (1928); Symposium, *Officers' and Directors' Responsibilities and Liabilities*, 27 BUS. LAW. 1, 130 (1972).

[148]For the jurisdictions adopting the various techniques, see 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 231-35 (1971); HENN § 380, at 810 n.38.

[149]IND. CODE § 23-1-2-2(10) (1971).

[150]*Id.* § 27-1-7-2(9).

ness Corporation Act, the newly adopted *insurance* provisions are identical to the Model Act.[151]

In clearly allowing for liability insurance, Indiana joins a growing list of jurisdictions recognizing that the corporation's right or power to indemnify personnel for expenses of defending actions arising out of their corporate status might not adequately protect their interests.[152] Director and officer, commonly "D & O," insurance does afford this added protection. Although the former indemnification provision of the General Corporation Act did not refer to liability insurance, the purchase of such insurance was probably permitted in implementing the right to indemnification, at least to the extent indemnification was permitted, or under the inherent power of a corporation to compensate corporate personnel.[153]

The intriguing aspect of the insurance provision is that it clearly authorizes the purchase of insurance covering liability that could not be indemnified by the corporation itself. Consequently, the issue is raised whether or not insurance can be purchased by the corporation which has the effect of freeing corporate personnel from the fear of civil liability for breaching their duty to show good faith in dealings with the corporation.[154] Although the language of the provision does seem to raise that possibility, it is not unlikely that public policy would preclude insuring against gross negligence, self-dealing, or conduct amounting to total abdication of corporate responsibility. A more appropriate interpretation of the new section would be to limit insurance to situations involving, for example, ordinary negligence in the performance of a duty to the corporation. Such liability would bar indemnification by the corporation but since it does not amount to grave wrongdoing, there is no more harm to the public interest than is caused by automobile liability insurance.[155] In this respect it should be noted that the Securities and Exchange Commission has been particularly hostile to indemnification and insurance for liabi-

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[151]1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5(g) (1971).

[152]HENN § 380, at 812; Knepper, *supra* note 35.

[153]Note, *Liability Insurance for Corporate Executives*, 80 HARV. L. REV. 648 (1966).

[154]*See* Bishop, *Sitting Ducks and Decoy Ducks; New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1087 (1968); Note, *Public Policy and Directors' Liability Insurance*, 67 COLUM. L. REV. 716 (1967).

[155]*See* note 42 *supra*.

lity arising under the Securities Act of 1933[156] and has severely restricted the indemnification of officers, directors, and controlling persons.[157] This hostility does not appear to bar all indemnification or insurance under the Securities Act but clearly does bar any indemnification or insurance defeating the objectives of statutory liability under sections 11 and 12 of the Act.[158]

Of course, authorization to purchase insurance covering even total breaches of corporate responsibility does not guarantee finding an insurance company ready and willing to insure against such risks. As Professor Bishop points out, the existence of such insurance might well increase the risks insured against,[159] and insurers are not inclined to develop or retain insurance policies that have that result. Thus the self-interest of insurance companies would insure that "D & O" insurance would not be counterproductive.

5. *Professional Corporations—Officers*

A serious obstacle to the development of solely-owned professional corporations in Indiana was eliminated by the simple expedient of amending the shareholder qualification provisions of the General Professional Corporation Act,[160] the Professional Medi-

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[156]15 U.S.C. §§ 77a-aa (1970).

[157]17 C.F.R. § 230.460, Note (a) (1972). *See* Kroll, *Some Reflections on Indemnification Provisions and S.E.C. Liability Insurance in the Light of* Barchris *and* Globus, 24 BUS. LAW. 681, 687-92 (1969).

[158]15 U.S.C. §§ 77k, 1 (1970). *See* Kroll, *supra* note 157, at 691-92.

[159]Bishop, *supra* note 42, at 1094. For a discussion of the terms of a typical D & O policy and an evaluation checklist, see Hinsey & DeLancey, *Directors and Officers Liability Insurance—An Approach to its Evaluation and a Checklist,* 23 BUS. LAW. 869 (1968).

[160]IND. CODE §§ 23-1-13-1 to -11 (1971), *as amended* Ind. Pub. L. No. 246 (April 9, 1973). Although there are other benefits resulting from the incorporation of a professional practice, such as unlimited duration and limited liability, the prime motivation for utilizing the corporate form has been to enjoy the tax benefits available to corporations and their employees which traditionally have been unavailable to sole proprietors and members of partnerships. *See generally* HENN § 77. The legal periodicals are replete with articles discussing the tax considerations for incorporation. *See, e.g.,* Levenfeld, *Professional Corporations and Associations,* 8 HOUSTON L. REV. 47 (1970); Overbeck, *Current Status of Professional Associations and Professional Corporations,* 23 BUS. LAW. 1203 (1968); Weinberg, *A Brief Look at the Advantages and Disadvantages of Professional Corporations,* 6 CREIGHTON L. REV. 17 (1973); *Incorporating a Private Practice—A Complete Checklist,* 16 PRAC. LAW., May 1970, at 69. Of course, it should be noted that the liberalization of benefits available for self-employed persons under the Keogh

cal Corporation Act,[161] and the Professional Dental Corporation Act[162] to permit the same person to serve as both president and secretary.[163] The problem can be traced back to the adoption of the Professional Medical Corporation Act in 1963 and the General Professional and Professional Dental Corporation Acts in 1965. Recognizing the inefficiency of restating the formalities required for organizing corporations and the provisions relating to the general powers, privileges, duties, or liabilities of domestic corporations under the Indiana General Corporation Act,[164] the General Assembly simply incorporated them by reference except when inconsistent with the specific provisions and purposes of the professional corporation acts.[165]

One of the provisions incorporated by reference was Indiana Code section 23-1-2-13 relating to the election of officers of general corporations and their duties and responsibilities. This section provides that when the bylaws of the corporation permit, "two or more offices may be held by the same person, except that the duties of the president and secretary shall not be performed by the same person."[166] Since many corporate documents or instruments must be acknowledged or verified by two officers, it does make sense to have different persons serving as the chief executive officer and the ministerial officer whose primary function is

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Act, 26 U.S.C. §§ 401-04 (1970), has somewhat reduced the drive towards professional incorporation.

[161] IND. CODE §§ 23-1-14-1 to -21 (1971).

[162] *Id.* §§ 23-1-15-1 to -21.

[163] The pertinent sections, in the order mentioned, are *id.* §§ 23-1-12-1 to -6, -13-4.

[164] *Id.* §§ 23-1-1-1 to -10-6, -12-1 to 6.

[165] *Id.* §§ 23-1-14-5 (medical), -15-5 (dental). A slightly different approach was used for the General Professional Act. Instead of referring to the General Corporation Act, section 23-1-13-11 incorporates the provision of the Medical Professional Corporation Act which in turn relates to the General Corporation Act. Such an incorporation by double reference would not normally make sense, but it should be pointed out that section 23-1-13-11 also incorporates other provisions of the Medical Professional Corporation Act, for example, those relating to limitation of purposes (§ 23-1-14-6) the necessity for a certificate of registration (§ 23-1-14-8) and renewal thereof (§ 23-1-14-9), the limitation on issuance and transfer of shares (§ 23-1-14-10).

[166] This is not an uncommon restriction in corporation statutes. *See* 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 91-4 (1971); HENN § 270 at 434, n.7.

to certify copies of corporate records and to keep and attest the corporate seal.[167] This requirement does not create any difficulty for general corporations even when there is only one shareholder and, as permitted by the General Corporation Act in such situations, one director.[168] A spouse, a family member, an employee, or the attorney for the corporation can always serve as the secretary.

However, the professional corporation situation was complicated by the requirement of the three Acts that only individuals holding unlimited licenses to practice the relevant profession could be officers, directors, or shareholders of professional corporations.[169] Thus the sole practitioner wishing to incorporate was forced to find another licensed professional to serve as the secretary of the corporation. Finding someone willing to undertake this responsibility for another practitioner might be difficult even in a sizable metropolitan area, but doubtless it would be impossible in small communities where there might be only one doctor, lawyer, or dentist. Certainly there was no legislative intent to limit professional corporations to what were, or would be in the absence of the statutes, partnerships. To the contrary, all three Acts provide that "an individual" can organize and become a shareholder of a professional corporation.[170]

New legislation[171] eliminated the difficulty by eliminating the restriction. In so doing, Indiana joins those jurisdictions which have resolved the problem of the solely-owned professional corporation by eliminating the restriction against the same person's serving in two capacities[172] or by eliminating the requirement that certain officers be licensed professionals.[173] It is possible that the enactment was not really necessary. All three professional corporation acts provide that the General Corporation Act provisions

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[167]Citizens' Dev. Co. v. Kypawva Oil Co., 191 Ky. 183, 229 S.W. 88 (1921); HENN § 225, at 434 n.7; LATTIN § 75.

[168]IND. CODE § 23-1-2-11(b) (1971) provides that the number of directors shall not be less than three unless there are only one or two shareholders when, respectively, one or two directors are permitted.

[169]*Id.* §§ 23-1-13-6 (general), -14-12 (medical), -15-12 (dental).

[170]*Id.* §§ 23-1-13-6 (general), -14-4 (medical), -15-4 (dental).

[171]Ind. Pub. L. No. 246 (April 19, 1973).

[172]*E.g.*, TEX. REV. CIV. STAT. ANN. art. 1528f, § 9(g) (Cum. Supp. 1972) (any one person may serve in more than one office, provided that the president and secretary are not the same person unless the professional association has only one member).

apply "except where inconsistent with the provisions and purpose of this Act," and that the professional corporation act "shall take precedence in the event of any conflict with the Indiana General Corporation Act."[174] Since the professional corporation acts contemplate sole ownership and require that all officers be licensed professionals, it is not inconceivable that a court would rule that the General Corporation Act was impliedly amended to permit one person to hold the offices of president and secretary when there is no other eligible person involved in the corporation.[175]

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[173]*E.g.*, ALA. CODE tit. 46 § 336 (Cum. Supp. 1971); GA. CODE ANN. § 84-5404(c) (Supp. 1972); S.C. CODE ANN. § 56-1606 (Supp. 1971).

[174]IND. CODE §§ 23-1-13-11 (general), -14-5 (medical), -15-5 (dental) (1971).

[175]*Cf.* Christian v. Skideler, 382 P.2d 129 (Okla. 1963), in which the court held that the three director requirement of the Oklahoma general corporation law did not apply when only two persons were incorporating and a third qualified director might not be available.

VI. CRIMINAL PROCEDURE

*William A. Kerr**

On January 1, 1972, the Indiana Court of Appeals acquired jurisdiction over criminal appeals, thus marking a major change in Indiana criminal procedure.[1] Under the new procedure, the court of appeals has jurisdiction over all criminal appeals except for a limited number of cases over which the Indiana Supreme Court has retained exclusive jurisdiction such as appeals from judgments imposing a sentence of death, life imprisonment, or a minimum sentence of greater than ten years, and appeals involving cases in which a state or federal statute has been declared unconstitutional in whole or in part.[2] Since there are only a few offenses

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[1]*See* IND. R. APP. P. 4 (adopted by the Indiana Supreme Court pursuant to Ind. Code § 33-2.1-3-1 (1971) and the amendment to article 7 of the Indiana Constitution which was approved on November 3, 1970).

[2]IND. R. APP. P. 4(A)(7)-(8), (B).

that are punishable by a sentence of death or life imprisonment or by a minimum sentence of greater than ten years,[3] the court of appeals thus has jurisdiction over the bulk of criminal appeals. The court of appeals has, however, questioned the constitutionality of such a broad grant of jurisdiction, suggesting that the supreme court should have retained jurisdiction over any appeal involving a maximum sentence of greater than ten years.[4]

Although each of the three divisions of the court of appeals filed an opinion prior to June of 1972,[5] the divisions did not begin

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[3]IND. CODE § 35-21-4-3 (1971) (Murder of police officer); *id.* § 35-1-55-1 (kidnapping); *id.* § 35-13-4-1 (first degree murder); *id.* § 35-1-54-1 (second degree muder); *id.* § 35-24-1-20 (second sale of narcotics); *id.* § 35-13-5-6 (physical injury inflicted during robbery); *id.* § 35-13-5-3 (rape of child under twelve years of age).

[4]Ware v. State, 284 N.E.2d 543, 544 n.1 (Ind. Ct. App. 1972). Article 7, § 4 of the Indiana Constitution provides "that appeals from a judgment imposing a sentence of . . . imprisonment for a term greater than ten years shall be taken directly to the Supreme Court." The Indiana Supreme Court had previously ruled that indeterminate sentences are for the maximum time prescribed by the statute. Moore v. State, 276 N.E.2d 840 (Ind. 1972); Boyd v. State, 275 N.E.2d 797 (Ind. 1971). Consequently, the court of appeals sitting en banc disagreed with, but was bound by, the Indiana Supreme Court's decision to give the court of appeals jurisdiction over criminal appeals in all cases except those in which the minimum sentence is greater than ten years.

[5]Davis v. State, 281 N.E.2d 833 (Ind. Ct. App. 1972); Johnson v. State, 281 N.E.2d 922 (Ind. Ct. App. 1972); Lewis v. State, 280 N.E.2d 828 (Ind. Ct. App. 1972).

The *Lewis* case was filed by the First District Court of Appeals on April 6, 1972; the *Davis* case was filed by the Second District Court of Appeals on May 3, 1972; and the *Johnson* case was filed by the Third District Court of Appeals on May 8, 1972. Although the Indiana Court of Appeals is a unified court to the extent that the nine judges select one of their number to serve as a chief judge pursuant to the provisions of the IND. CODE § 33-2.1-2-4 (1971) and sit en banc to make certain decisions, *see e.g.*, Ware v. State, 284 N.E.2d 543 (Ind. Ct. App. 1972), the court is divided into three distinct divisions with appellate jurisdiction over clearly defined geographic areas of the State of Indiana as specified by IND. CODE § 33-2.1-2-2 (1971). This statute further provides that the various divisions of the court are to be designated as the First District Court of Appeals, the Second District Court of Appeals, and the Third District Court of Appeals. Furthermore, the judges of the respective districts are required to be residents of such geographic districts, IND. CODE § 33-2.1-2-3 (1971), and are to select one of their number to be chief judge of each such district court, IND. CODE 33-2.1-2-4 (1971). In view of these factors, the author has concluded that the divisions of the Indiana Court of Appeals are somewhat autonomous in nature, that they are somewhat comparable to the various federal circuit courts of appeal, and that they can be expected to develop a body of case law that may differ from

to file opinions with any regularity until June 6, 1972.[6] Since that date, the various divisions have filed approximately 195 opinions.[7] During the same period of time, by way of comparison, the supreme court has filed approximately 140 criminal opinions. This survey will review the major decisions of both courts since June of 1972 as well as the opinions filed by the supreme court from January to June of 1972 which were approximately eighty in number. In view of the number of opinions filed during the period, this survey is necessarily somewhat selective in nature. The opinions that are included in the survey are reviewed in the general order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pretrial issues and continuing with issues pertaining to the trial and posttrial stages.

A. Search and Seizure

1. Stop and Frisk

In *Luckett v. State*,[8] the Indiana Supreme Court unanimously held that an officer may stop and detain a suspect briefly for investigation even though the officer does not have probable cause to make a formal arrest. In that case, an eyewitness to a burglary reported his observations to the police, including the fact that three persons drove away from the scene of the burglary in what appeared to be a green Chevrolet with a license prefix of "82J." An officer on patrol in the area received this information over the police radio and shortly thereafter stopped three persons who were in a green Oldsmobile with a license prefix of "82J." While the driver of the car was producing his operator's license, the officer observed a case of wrist watches in plain view on the back seat of the car. Since a case of wrist watches had been reported stolen during the burglary, the officer promptly placed all three occupants of the car under arrest. The supreme court concluded that the detention for investigation was lawful on the basis of

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division to division. For these reasons, the various divisions are carefully distinguished throughout this article in accordance with the particular district involved.

[6]Four opinions were filed on June 6, 1972. Coakley v. State, 283 N.E.2d 392 (Ind. Ct. App. 1972); Treadwell v. State, 283 N.E.2d 397 (Ind. Ct. App. 1972); McMinoway v. State, 283 N.E.2d 553 (Ind. Ct. App. 1972); Allen v. State, 283 N.E.2d 557 (Ind. Ct. App. 1972).

[7]This survey reviews the opinions filed by the court of appeals and the supreme court up to the end of July 1973.

[8]284 N.E.2d 738 (Ind. 1972).

the information known to the officer at the time and that the observation of the case of wrist watches added enough information under the circumstances to establish probable cause for the arrests. In so holding, the court followed *Adams v. Williams*[9] which was decided by the United States Supreme Court only a few weeks prior to the *Luckett* decision. The Indiana Supreme Court also cited *Terry v. Ohio*[10] but did not cite or discuss the Indiana "stop and frisk" statute, thereby continuing to leave the effect and validity of that statute in question.[11]

The Indiana "stop and frisk" statute was enacted in 1969, following the decision of the United States Supreme Court in the *Terry* case. The statute authorized both the stopping and the frisking of a suspect despite the fact that the United States Supreme Court expressly declined to rule upon the validity of the "stop" in the *Terry* case or to decide the authority of an officer to stop a suspect on less than probable cause.[12] In *Terry*, the Court considered only the propriety of a frisk of a suspect who had been stopped by an officer for questioning concerning suspicious activity. The Court concluded that a limited frisk of the suspect for weapons was lawful under the circumstances since the officer had reason to believe that he might be in danger during the course of the questioning, but the Court declined to rule on the validity of the initial stopping or detention of the suspect for questioning before the frisk occurred. Despite the narrow holding, the *Terry* case has often been referred to as a "stop and frisk" case rather than as a "frisk" case.[13]

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[9]407 U.S. 143 (1972).

[10]392 U.S. 1 (1968).

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> When a law enforcement officer . . . reasonably infers . . . that criminal activity has been, is being, or is about to be committed by any person . . . said officer may stop such person for a reasonable period of time and may make reasonable inquiries . . . .

IND. CODE § 35-3-1-1 (1971).

> When a law enforcement officer has stopped a person for temporary questioning . . . and he further reasonably concludes . . . that the person with whom he is dealing may be armed and presently dangerous, he shall be entitled . . . to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him.

Id. § 35-3-1-2.

[12]392 U.S. at 19 n.16.

[13]*See, e.g.*, Chimel v. California, 395 U.S. 752, 762 (1969); Hadley v. State, 251 Ind. 24, 42, 238 N.E.2d 888, 897 (1968) (Lewis, J., concurring).

Four years after the *Terry* decision, the United States Supreme Court decided *Adams v. Williams,*[14] another case which appears to be a "stop and frisk" case but which is in fact not a "frisk" case. In *Adams,* an informer told a police officer that the defendant was sitting in a nearby vehicle, was carrying narcotics, and had a gun at his waist. The officer approached the car and asked the defendant to open the door. When the defendant rolled down the window instead, the officer reached into the car and removed a pistol from the defendant's waistband. The pistol was not visible from outside the car but was exactly where the informer had said it would be. An arrest followed and a further search revealed heroin on the defendant's person and in the car. The Court referred to the *Terry* decision and concluded that the officer acted reasonably in light of the circumstances. The Court observed that the informant was known to the officer personally, that the informant had provided the officer with information in the past, and that the information was immediately verifiable at the scene and then concluded that the information "may have been insufficient for a narcotics arrest or search warrant"[15] but was sufficiently reliable to justify the forcible stop of the defendant. Thus the Court did not clearly state that the stop was based upon less than probable cause but held that the stop was justified even though it may not have been based upon probable cause. Furthermore, the Court upheld the action of the officer in seizing the pistol even though this was not a "frisk," at least in the usual sense of the word. The officer reached directly into the car and pulled the hidden pistol from the defendant's waistband instead of first conducting a limited patdown of the defendant's outer garments. Thus the *Adams* decision is a "stop" case and not necessarily a "frisk" case.

Returning to the *Luckett* decision, the Indiana Supreme Court also dealt only with the propriety of the "stop" involved since the officer there did not attempt to frisk the three suspects prior to making the arrests. The court did, however, clearly hold that the stop was made on less than probable cause but was justified under the circumstances. In so holding, the court stated that the officer had sufficient information "to warrant a man of reasonable caution in the belief that an investigation was appropriate,"[16] thus suggesting that this is the standard for determining the validity

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[14]407 U.S. 143 (1972).

[15]*Id.* at 146-47.

[16]284 N.E.2d at 742.

of a stop made on less than probable cause. If so, then the court has taken at least one step toward clarifying the validity and effect of the Indiana "stop and frisk" statute, but there are still many additional issues to be resolved concerning that statute.[17]

2. *Motor Vehicle Searches and Seizures*

The *Luckett* decision also dealt with two other issues of particular concern with regard to motor vehicles. Despite the fact that the court concluded that the stopping of the suspects was justified even though probable cause for a formal arrest was lacking, the court also concluded that the initial stopping of the vehicle amounted to a detention of the persons involved and thus "in its technical sense, constituted an arrest."[18] The court thus declined to use terminology which would distinguish between an arrest based upon probable cause and a detention based upon less than probable cause. In so doing, the court appeared to follow the view expressed earlier in the term in *Lynch v. State*[19] in which it was held that an arrest occurred as soon as an officer on patrol turned on his red light and stopped the defendant's car. The United States Supreme Court also struggled with this same question of terminology in the *Terry* case but concluded only that the word "seizure" in the fourth amendment should be broad enough to include both an "arrest" and a "detention" if both terms are used.[20]

The second issue in the *Luckett* case concerned the validity of the search of the defendant's motor vehicle after the vehicle was impounded and removed to the police station. In the case, the vehicle was stopped along a highway at night and the officer had probable cause to believe that the vehicle contained stolen property after seeing the case of wrist watches. The officer, who was alone at the time, called for assistance and then the three defendants were taken to the police station. The motor vehicle was impounded and was later searched without a warrant. Items found in the car were later identified as property taken during the burglary. The court relied upon the decision of the United States Supreme Court in *Chambers v. Maroney*[21] in holding that the later search

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[17]For example, can an officer require a suspect to identify himself or answer any questions asked? Can the suspect be required to accompany the officer to another place for questioning or while the officer is checking on an answer or explanation given by the suspect? Can items other than weapons found during a frisk be used in evidence against the suspect?

[18]284 N.E.2d at 741.

[19]280 N.E.2d 821, 823 (Ind. 1972).

[20]392 U.S. at 17-19.

[21]399 U.S. 42 (1970).

at the police station was valid. It held that a search could have been conducted at the time that the car was stopped because of probable cause to believe that the car contained stolen property and that the officers were authorized to impound the car and search it later without a warrant since a search at the time the car was stopped may have been impractical or even unsafe under the circumstances.[22] Since such exigent circumstances were found to exist, the *Luckett* case thus leaves open the more difficult question as to the propriety of a search at the police station when a search at the scene of the stopping would not have been impractical under the circumstances. This question was left unresolved in *Chambers v. Maroney* because the text of the opinion appears to make no distinction between the two situations whereas a footnote to the text emphasizes that a search at the scene would have been impractical under the circumstances.[23]

3. Inventory Searches

Since the *Luckett* case involved a situation in which probable cause existed to believe that stolen property was inside the defendant's automobile, the Indiana Supreme Court was not called upon to consider the validity of an "inventory search" after the impounding of the defendant's vehicle. In fact, the validity of such "searches" of motor vehicles continues to remain in question in Indiana as well as under the United States Supreme Court decisions. On the other hand, the validity of such "searches" of persons is apparently becoming fairly well established under the Indiana decisions.

In *Ramirez v. State*,[24] the defendant was arrested while attempting to commit a burglary at a certain office. He was taken to the police station where he was directed to remove everything from his pockets. An envelope was produced containing money which was found to have been taken during a burglary of another building. The Third District Court of Appeals held that the envelope was properly admitted into evidence in a prosecution for the burglary of the second building since the envelope was obtained contemporaneously with the booking of the defendant for the burglary of the first building. In so doing, the court of appeals relied upon a similar decision of the Indiana Supreme Court in *Farrie v. State*[25] which was decided during the preceding year.

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[22]284 N.E.2d at 743-44.

[23]399 U.S. at 52 n.10.

[24]286 N.E.2d 219 (Ind. Ct. App. 1972).

[25]255 Ind. 681, 266 N.E.2d 212 (1971).

The Second District Court of Appeals relied upon both *Farrie* and *Ramirez* in reaching a similar conclusion in *McGowan v. State.*[26] In *McGowan,* a jailkeeper was making a routine search of the defendant following an arrest for the unlawful possession of a pistol. During the search, a packet of marihuana was "dropped" by the defendant. The court of appeals held that this evidence was properly admitted against the defendant on a charge of possession of marihuana.

4. Consent to Searches

In *Sayne v. State,*[27] the Indiana Supreme Court recognized that a search may be based upon consent but emphasized that the state has the burden of proving a voluntary and intelligent waiver of rights and that mere passive submission to the authority of an officer does not amount to such consent. In *Sayne,* an officer asked the defendant to pull down the sunvisor in the defendant's car but could not recall the exact words used in making the request. The court held that the defendant's compliance with this request could not be interpreted as a consent for the officer to reach behind the sunvisor to locate a package of marihuana hidden between the windshield and the car's convertible top.

The supreme court turned to an even more controversial question in *Zupp v. State,*[28] the question of whether or not a person must be advised of his fourth amendment rights before being asked to consent to a search. In the *Zupp* case, the defendant was arrested on a charge of rape. He was then advised of his fourth amendment rights, including the right to refuse to permit the search and the right not to have the search conducted without a warrant, and was asked for permission to conduct a search of his automobile and his living quarters. The defendant signed a waiver form which recited the warning of rights which was given to him. Thereafter, the defendant objected to the admissibility of evidence which was obtained during the search, alleging that he had been illegally arrested upon a warrant which was issued without a showing of probable cause. The supreme court held that the consent to the search was valid and that it insulated the search from any taint that might have existed because of the illegal arrest. In so doing, the court commended the officers for

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[26]296 N.E.2d 667 (Ind. Ct. App. 1973).

[27]279 N.E.2d 196 (Ind. 1972).

[28]283 N.E.2d 540 (Ind. 1972).

advising the defendant of his rights and said, "We wholeheartedly endorse the police procedure employed herein in this regard."[29]

Since the warning of rights was actually given in this case, the "endorsement" of the practice by the court is ambiguous, leaving open the question as to whether or not the practice would in fact be required. If the court intended to require such a practice, then the decision would appear to be contrary to the more recent opinion of the United States Supreme Court in *Schneckloth v. Bustamonte.*[30] Although the *Schneckloth* opinion was limited to a situation in which the subject of the search was not in custody at the time of the search, the language of the opinion would appear to be broad enough to suggest that there is no requirement for a warning of rights even as to a suspect in custody, such as in the *Zupp* case.

The other aspect of the *Zupp* holding is just as important as the part concerning the warning. The court commended the officers for following the practice because the court concluded that the consent eliminated any question concerning the admissibility of the evidence produced by the search. Thus the court has placed a limitation on the extent of the doctrine concerning the "fruit of the poisonous tree."[31] Ordinarily, evidence that is obtained during a search incident to an unlawful arrest is tainted by the arrest and is not admissible against the arrested person. Under the *Zupp* case, however, a search is not considered incident to the arrest if the officers are able to obtain the arrested person's consent for the search following the arrest.

5. Search Warrants

In *State v. Dusch,*[32] the supreme court rendered a major decision concerning the execution of search warrants. In that case, an officer obtained a warrant to search the defendant's apartment for certain illicit drugs. The officer and four other policemen went to the apartment and broke open the front and back doors to conduct the search without first knocking and announcing their authority and purpose. The defendant was found inside the apartment along with some marihuana and certain pills. At the defendant's trial, the evidence was suppressed and

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[29]*Id.* at 541.

[30]93 S. Ct. 2041 (1973).

[31]Nardone v. United States, 308 U.S. 338, 341 (1939).

[32]289 N.E.2d 515 (Ind. 1972).

a judgment of acquittal was entered for the defendant. The State appealed on a reserved question with reference to the suppression ruling.[33] The court first held that the requirement for a knock and an announcement of authority and purpose is a matter of fundamental due process which is required under the provisions of both the Indiana and the United States Constitutions. In particular, the court interpreted the decision in *Ker v. California*[34] as holding that the requirement is binding upon the states through the fourteenth amendment, although it recognized that there has been some question concerning such an interpretation of the *Ker* case. The court then held that exigent circumstances might justify an exception to the requirement but that the requirement could not be avoided by the mere fact that drugs were the object of the search. The state argued that a per se exception should be allowed in such cases because of the disposable nature of drugs, but the court held that the officers would have to show other exigent circumstances to justify an exception such as furtive conduct of the subject at the time of the search or knowledge that the drugs were of such a small amount that they could easily be destroyed.

The court, in this opinion, has resolved certain issues which were left unanswered by a sharply divided court in *Hadley v. State*[35] some four years earlier. In particular, the court, by holding that the knock and announcement requirement is a constitutional requirement, resolved the issue as to whether or not the Indiana statute requiring a knock and announcement prior to the execution of an arrest warrant[36] should be extended to arrests made without a warrant, as in the *Hadley* case, or to searches, as in the *Dusch* case. On the other hand, the *Dusch* decision appears to question the *Hadley* decision, at least insofar as the latter decision, in effect, permitted fresh pursuit to justify an exception to the knock and announcement requirement even when the person being pursued did not then know that he was being pursued.

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[33] The prosecuting attorney may except to any decision of the court during the prosecution of any cause, and reserve the point of law for the decision of the Supreme Court . . . . In case of the acquittal of the defendant . . . [t]he Supreme Court is not authorized to reverse the judgment upon such appeal, but only to pronounce an opinion upon the correctness of the decision of the trial court. . . .

IND. CODE § 35-1-43-2 (1971).

[34] 374 U.S. 23 (1964).

[35] 251 Ind. 24, 238 N.E.2d 888 (1968).

[36] IND. CODE § 35-1-19-6 (1971).

Finally, the First District Court of Appeals issued another major opinion with reference to search warrants in the case of *Holtel v. State.*[37] In that case, a search warrant was issued by the trial court, a superior court judge, after a hearing at which evidence was taken and recorded on the issue of probable cause. Thereafter, a motion was filed to suppress the evidence which was obtained from the defendant's apartment on the ground that no affidavit had been filed to support the issuance of the search warrant. The trial court denied the motion, holding that the transcript of the hearing was sufficient in lieu of an affidavit. The court of appeals rejected this conclusion, holding that an affidavit is an absolute requirement for the issuance of a search warrant and that the affidavit cannot even be supplemented by sworn testimony or additional evidence outside the affidavit. The court relied upon the express language of the Indiana statute concerning the issuance of search warrants[38] and the holding of the supreme court in *Ashley v. State*[39] but did not consider the later statement of the supreme court in *State ex rel. French v. Hendricks Superior Court*[40] which expressed a contrary rule, at least with reference to the issuance of arrest warrants.

B. Lineups and Photographic Identifications

1. Lineups

The Indiana Supreme Court, during the past year, handed down a landmark decision concerning lineups, ending some five years of controversy and speculation in the area, only to have the issue placed in question again within four months by another decision of the United States Supreme Court. In *Martin v. State,*[41] the Indiana Supreme Court concluded that a defendant has the right to the presence of an attorney at any "postarrest" lineup, holding that the only exception is for an immediate or on-the-scene confrontation within a short period of time after the offense in question. Thus the court ended the controversy that began five years earlier with the decisions of the United States Supreme Court in *United States v. Wade*[42] and *Gilbert v. California.*[43] Despite the

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[37]290 N.E.2d 775 (Ind. Ct. App. 1972).

[38]IND. CODE § 35-1-6-2 (1971).

[39]251 Ind. 359, 241 N.E.2d 264 (1968).

[40]252 Ind. 213, 224, 247 N.E.2d 519, 526 (1969).

[41]279 N.E.2d 189, 190 (Ind. 1972).

[42]388 U.S. 218 (1967).

[43]388 U.S. 263 (1967).

fact that all five members of the Indiana Supreme Court agreed on this aspect of the *Martin* case, the members of the court apparently were unable to predict the eventual holding of the United States Supreme Court on the critical issue. Within four months of the *Martin* decision, the Supreme Court handed down the decision of *Kirby v. Illinois*[44] which failed to resolve the controversy begun by *Wade* and *Gilbert* but did cast some doubt on the continued vitality of the *Martin* decision.

In the *Kirby* case, the two defendants were stopped by officers for investigation concerning a certain offense. When asked for identification, they produced a wallet and papers bearing the name of one Willie Shard. They were then arrested after giving an unsatisfactory explanation as to how they had obtained the wallet. After going back to the police station, the officers learned that Willie Shard had reported the theft of the wallet on the preceding day. Shard was promptly brought to the station and there identified the defendants as the persons who had taken his wallet. Some six weeks later, the defendants were indicted for the offense of robbery. The United States Supreme Court arguably could have considered this identification as an immediate confrontation, occurring within a very short period of time after the offense, but the Court did not do so, possibly because the identification occurred at the police station. Instead, the Court purported to resolve the controversy which had followed in the wake of *Wade* and *Gilbert* by holding that the defendants had no right to the presence of an attorney at the identification because "adversary judicial proceedings" had not been initiated against them at the time of the identification.

By emphasizing that the right to counsel does not arise until the initiation of adversary judicial criminal proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,"[45] the Court has given rise to a new controversy as various courts have attempted to decide precisely when adversary proceedings are initiated in a given case. Some courts have concluded that the right to counsel under *Kirby* arises only after formal charges have been filed, whether by way of indictment or information;[46] other courts have concluded that the right to counsel arises at least as soon as an arrest warrant

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[44]406 U.S. 682 (1972), *noted in* 6 IND. L. REV. 365 (1972).

[45]*Id.* at 689.

[46]Commonwealth v. Lopes, 287 N.E.2d 118 (Mass. 1972); Chandler v. State, 501 P.2d 512 (Okla. 1972).

is issued in a case, since the issuance of a warrant would mark the beginning of adversary judicial proceedings;[47] and at least one court has concluded that *Kirby* cannot be applied "mechanically" and that the right to counsel at a lineup must be determined from a consideration of all of the circumstances surrounding the particular lineup.[48]

Two of the divisions of the Indiana Court of Appeals have now considered the issue, and both divisions apparently have agreed that the right to counsel does not exist at a lineup held before an indictment or charging affidavit has been filed, although the decision is not altogether clear in the first opinion. In *Auer v. State,*[49] the defendant was accused of assaulting a twelve year-old girl. At the request of the victim's mother, officers took the victim and her mother to a factory to see if they could identify the defendant who was working there. The victim and her mother went to an office in the factory from which they could observe the defendant and six other men working in the factory. The defendant argued that this procedure violated his right to counsel, but the Third District Court of Appeals held that no right to counsel existed under the circumstances of the case. The court emphasized the fact that the defendant "was not in custody nor was he under arrest or charged at the time of the lineup."[50] The *Kirby* case was quoted at some length in support of this decision whereas the *Martin* case was cited only in a footnote and no attempt was made to harmonize the decisions. Since the defendant was not even under arrest at the time of the identification, the *Auer* decision does not necessarily resolve the issue as to whether adversary proceedings are initiated with the issuance of an arrest warrant or by the filing of an indictment or a charging affidavit.

Six months after the *Auer* decision, the First District Court of Appeals considered the same issue in the case of *Snipes v. State.*[51] In that case, the defendant was arrested for robbery and

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[47]Arnold v. State, 484 S.W.2d 248 (Mo. 1972); United States *ex rel.* Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972).

[48]Moore v. Oliver, 347 F. Supp. 1313, 1319 (W.D. Va. 1972).

[49]289 N.E.2d 321 (Ind. Ct. App. 1972).

[50]*Id.* at 326.

[51]298 N.E.2d 503 (Ind. Ct. App. 1973). The remaining district court, the Second District Court of Appeals, has also reached the same conclusion although the court has not made a direct holding to that effect. In Hardin v. State, 287 N.E.2d 359, 360 (Ind. Ct. App. 1972), the defendant argued on appeal that he had been denied the right to counsel at an on-the-

was thereafter placed in a lineup. The defendant's attorney was not present at the lineup even though the defendant had requested the officers to ask the attorney to be present. Although the defendant argued that his right to counsel had been violated, the State contended that the defendant had agreed to proceed with the lineup after being told that his attorney was unable to be present at the time the lineup was scheduled to be held. The court did not have to resolve this factual issue because it concluded that the defendant had no right to the presence of an attorney since the lineup was held before the charging affidavit had been filed against him. In so holding, the court cited both the *Auer* and the *Kirby* decisions but did not discuss the *Martin* case.

2. Photographic Identifications

In *Sawyer v. State*,[52] the Indiana Supreme Court held that a defendant who had been charged with a robbery had no right to have his attorney present when police officers thereafter displayed various photographs to a victim of the robbery. In so doing, the court followed the recent decision of the United States Supreme Court in *United States v. Ash*.[53] The *Ash* decision resolved a conflict which had arisen in the cases on this issue, and the Indiana Supreme Court followed the decision without in any way relating the decision concerning photographic identifications to the current controversy concerning lineup identifications. The Indiana Supreme Court did, however, hold that it was improper for the officers conducting the investigation to advise the witness that the defendant had been arrested and that his picture was included in the group of photographs being examined and noted that such a procedure would be unduly suggestive even with reference to a lineup identification.

The Indiana Supreme Court also decided one additional case during the past term which is of equal importance to both lineup

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street confrontation. This argument was rejected by the court of appeals because the argument had not been raised at the trial, but the court noted that *Kirby* had held that there is no such right to counsel before the defendant has been formally charged with a crime. A similar conclusion was reached by the same court in McGowan v. State, 296 N.E.2d 667, 672 (Ind. Ct. App. 1973), but within a different context. In *McGowan*, the defendant argued that a custodial search was a critical stage of the criminal process and that he was denied his right to counsel when he was searched while being booked at the city jail. The court of appeals held that the defendant had no right to counsel at the time of the search since formal charges had not been instituted against him. *Kirby* was cited in support of the conclusion.

[52]298 N.E.2d 440 (Ind. 1973).

[53]93 S. Ct. 2568 (1973).

and photographic identifications. In *Johnson v. State,*[54] the court held that a witness could testify at a trial that he had identified the defendant previously at a lineup, provided that the lineup was conducted properly. In so doing, the court expressly overruled two earlier cases to the contrary.[55]

C. Confessions

1. Miranda Requirements

In *Dickerson v. State,*[56] the Indiana Supreme Court plunged back into the controversy as to whether the emphasis upon "custody" in *Miranda v. Arizona*[57] has replaced the emphasis upon "focus" as discussed in *Escobedo v. Illinois.*[58] In *Dickerson,* the victim of a rape filed a complaint with the police and alleged that the defendant had committed the offense. On the day after the complaint was filed, the defendant went to the police station on other business and was recognized by a policeman who knew about the rape complaint. The officer told the defendant about the complaint and asked if he could talk to the defendant but stated that the defendant was not under arrest. The defendant consented and went into an interrogation room where he was advised of his rights and signed a waiver form before being questioned. He then admitted having been with the victim on the night in question but denied the rape. Although the various members of the court disagreed as to the propriety of the warnings given to the defendant, all members apparently agreed that the warnings were required under the circumstances of this case. The court recognized that the defendant was told that he was not under arrest at the time, but it concluded that the circumstances were such as to subject the defendant to a "significant deprivation of freedom" so as to require a warning of rights. In discussing the various circumstances, the court referred twice to the fact that the investigation had "focused" on the defendant,[59] thus re-emphasizing the language of the *Escobedo* case. Despite the use of this language, however, the opinion does suggest that the court merely considered this as one factor among others which led to the conclusion that the defendant was deprived of his free-

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[54]281 N.E.2d 473 (Ind. 1972).

[55]Thompson v. State, 223 Ind. 39, 58 N.E.2d 112 (1944); Jacoby v. State, 203 Ind. 321, 180 N.E. 179 (1932).

[56]276 N.E.2d 845 (Ind. 1972).

[57]384 U.S. 436 (1966).

[58]378 U.S. 478 (1964).

[59]276 N.E.2d at 848.

dom to such an extent as actually to be in custody at the time of the interrogation. In fact, the court led into this part of its opinion by referring to the language of the *Miranda* decision and stating that its duty was to decide whether the defendant was "in custody or otherwise deprived of his freedom of action in any significant way."[60] The court might have reached the same conclusion in a similar way by finding that the defendant actually was under arrest and in custody at the time despite the fact that he was told that he was not under arrest. In this regard, the First District Court of Appeals restated the general rule in *Yeley v. State*[61] that the making of an arrest does not necessarily depend upon what is said to the subject but depends upon a consideration of all of the circumstances at the time.

The *Dickerson* decision also dealt with another issue that has been before the court a number of times during the past year as well as in previous years. The court once again approved the propriety of a warning by which a defendant is advised of his right to the assistance of appointed counsel before and during any interrogation and is then told that "[w]e have no way of giving you a lawyer but one will be appointed for you, if and when you go to court and the court finds that you are a pauper." The court approved similar language in two later cases during the year[62] despite the fact that the United States Court of Appeals for the Seventh Circuit, after the *Dickerson* case, had disapproved the same language in the case of *United States ex rel. Williams v. Twomey*.[63]

The Indiana Supreme Court decided two other major cases during the year which dealt with the *Miranda* warnings. In view of the controversy over the language of the warnings as discussed above, the first decision is especially significant. In *Johnson v. State*,[64] the court held that statements obtained in violation of the *Miranda* requirements are admissible at a trial on rebuttal for impeachment purposes only. Although the court was sharply

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[60]*Id.* at 847.

[61]286 N.E.2d 183 (Ind. Ct. App. 1972).

[62]Burton v. State, 292 N.E.2d 790 (Ind. 1973); Emler v. State, 286 N.E.2d 408 (Ind. 1972).

[63]467 F.2d 1248 (7th Cir. 1972). The *Twomey* case arose in Illinois but involved both Illinois and Indiana waiver forms which used substantially the same language as that used in the *Dickerson* case. The opinion was written by Judge S. Hugh Dillin of the United States District Court for the Southern District of Indiana.

[64]284 N.E.2d 517 (Ind. 1972).

divided on the issue, the majority decided to follow the earlier decision of the United States Supreme Court in *Harris v. New York.*[65] The second decision, *Lewis v. State,*[66] involved the first degree murder conviction of a juvenile who was tried by jury in a circuit court. The supreme court reversed the conviction because the juvenile's confession had been admitted into evidence and the juvenile's parents had not been advised of the juvenile's rights before the interrogation took place. The court concluded that special protections should be given to juveniles before interrogations occur, including a warning of rights to the juvenile and his parents or guardian and an opportunity for the juvenile to consult with his parents or guardian or an attorney before deciding upon a waiver. The opinion of the court apparently was intended to establish this rule for juvenile hearings as well as criminal trials,[67] but only two justices concurred on this point. Two other justices concurred in the result of the case but insisted that the rule should apply only in criminal trials and not in juvenile proceedings. Thus the issue remains in doubt in the area of juvenile hearings.

The Indiana Court of Appeals also handed down an important decision during the year concerning the *Miranda* warnings and confessions in general, but the opinion merely poses a major question without providing the necessary answer. In *Ramirez v. State,*[68] the defendant was interrogated concerning a certain burglary. At his trial, he contended that the confession was involuntary. A hearing was held by the trial court out of the presence of the jury and the police officers testified that they had given the defendant a copy of his rights, had read the rights to him, and had made sure that he understood the rights before he signed a waiver and agreed to discuss the burglary. The defendant's testimony contradicted that of the officers but the trial court concluded that the confession was voluntary. The confession and waiver were admitted into evidence and the jurors were properly instructed that they were the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. The Third District Court of Appeals reviewed the procedure followed by the trial court and held that the confession was properly admitted into evidence. In support of this decision,

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[65]401 U.S. 222 (1971).

[66]288 N.E.2d 138 (Ind. 1972).

[67]*Id.* at 142.

[68]286 N.E.2d 219 (Ind. Ct. App. 1972).

the court quoted extensively from the recent opinion of the United States Supreme Court in *Lego v. Twomey*.[69] The importance of the decision is in the fact that the Third District Court of Appeals did not directly state the burden of proof that is to apply in a hearing on voluntariness but did quote the portion of the *Lego* opinion which clearly stated that the burden of proof may be by a preponderance of the evidence. The court, however, left some doubt as to the applicability of this standard by quoting from a decision of the Indiana Supreme Court to the effect that the state had a "heavy burden" to prove the voluntariness of a confession.[70]

The issue is uncertain, especially in view of the earlier decision of the Indiana Supreme Court in *Smith v. State*[71] in which the court suggested that the burden of proof was proof beyond a reasonable doubt but left the issue unclear by using the following language:

> The state must establish beyond reasonable doubt all necessary elements of the crime. This requires that the state establish to the satisfaction of the Court that the confession is in truth and in fact a confession, that is that it was rendered freely and voluntarily, before the same may be submitted to a jury.[72]

If the present standard is proof beyond a reasonable doubt, the *Ramirez* case may indicate a move in the direction of lowering the standards in accordance with the *Lego* decision. Some states have done so,[73] but others have decided to continue with the heavier burden of proof despite the *Lego* decision.[74]

2. *Unlawful Detention*

The Indiana Supreme Court has consistently held that an unlawful detention is a circumstance to be considered in determining the voluntariness of a confession given during the period of such detention but that the confession is not automatically rendered inadmissible by such an unlawful detention.[75] The Indiana

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[69]404 U.S. 477 (1972).

[70]*See* Nacoff v. State, 267 N.E.2d 165, 167 (Ind. 1971), *quoted in* 286 N.E.2d at 222.

[71]252 Ind. 425, 249 N.E.2d 493 (1969).

[72]*Id.* at 438, 249 N.E.2d at 500 (citation omitted).

[73]*See, e.g.*, State v. Wajda, 206 N.W.2d 1 (Minn. 1973); McDole v. State, 13 CRIM. L. RPTR. 2270 (Fla., May 16, 1973).

[74]*See, e.g.*, State v. Collins, 297 A.2d 620 (Me. 1972).

[75]Nacoff v. State, 267 N.E.2d 165 (Ind. 1971); Smith v. State, 252 Ind. 425, 249 N.E.2d 493 (1969); Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954); Krauss v. State, 229 Ind. 625, 100 N.E.2d 824 (1951).

General Assembly codified this rule in the statute enacted in 1969 concerning the admissibility of confessions in criminal cases[76] but appeared to modify the rule somewhat by making a distinction between confessions given within six hours and confessions given more than six hours after the arrest or detention of the subject.[77] The interpretation of this statute is critical because the statute, on its face, purports to exclude any confession made after the six hour period has elapsed unless any further detention is found to be reasonable because of "the means of transportation and the distance to be traveled to the nearest available judge." If this provision is interpreted literally, the statute would appear to preclude the consideration of any other circumstance that might in fact make a delay reasonable and might even mean that the state is required to have a judge available at all hours of the day and night since the unavailability of a judge apparently cannot be taken into consideration.

The supreme court has indicated, however, that the statute should not be interpreted in this fashion although its decision did not in any way refer to this statute. In *Hill v. Otte*,[78] a motorist was arrested at 3:00 a.m. for driving while under the influence of intoxicating liquor and was taken before a magistrate at 8:30 a.m. the same morning. The court held that there was a duty to take the motorist before a magistrate as soon as practicable under the circumstances but that it was only necessary to take the motorist before a magistrate during the usual hours for conducting court. The court reaffirmed its earlier decision in *McClanahan v. State*[79] in which it was stated that the legislature could not even require magistrates to conduct court twenty-four hours every day because of the separation of powers doctrine.

The effect of an unlawful detention upon the admissibility of a confession was considered by the supreme court in two other cases during the past term, and the court reaffirmed the general rule as stated by it previously without in any way commenting upon the effect of the 1969 statute.[80] Both of these cases involved offenses arising prior to the effective date of the statute, however, and thus there was no necessity for the court to make any

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[76]IND. CODE § 35-5-5-2 (1971).

[77]*Id.* § 35-5-5-3.

[78]281 N.E.2d 811 (Ind. 1972).

[79]232 Ind. 567, 572, 112 N.E.2d 575, 577 (1953).

[80]Sanders v. State, 284 N.E.2d 751 (Ind. 1972); James v. State, 281 N.E.2d 469 (Ind. 1972).

comment concerning the effect of the statute. On the other hand, the Third District Court of Appeals did recognize and refer to the statute in the case of *Crawford v. State*.[81] In that case, the defendant was arrested without a warrant on a charge of robbery, was interrogated, and gave a written confession within two hours after the arrest. The defendant was thereafter kept in custody by the police for five days until a charging affidavit was filed against him, and he was not brought into court until fourteen days had elapsed from the time of the arrest. The defendant filed a motion to suppress the confession but the motion was denied after a pretrial hearing. Thereafter, the defendant made no objection to the admissibility of the confession when offered at his trial. In fact, his attorney affirmatively stated that he had no objections to the confession. Although the court of appeals held that the issue had been waived by the failure to object at the trial, it did observe that there was no violation of the 1969 statute since the confession had been given during the first two hours of the detention.

D. Self-Incrimination

1. Nontestimonial Evidence

The United States Supreme Court held in *Schmerber v. California*[82] that the fifth amendment privilege against self-incrimination does not apply to the production of evidence that is nontestimonial in nature. This decision was cited and relied upon by the Indiana Supreme Court in three major cases during the past term in which the court held that an accused may be required to provide handwriting exemplars,[83] to perform physical acts as tests to determine sobriety or intoxication,[84] and to provide blood samples.[85] In the handwriting and the sobriety test cases, the defendants provided the evidence voluntarily and thereafter challenged its admissibility on the ground that they had not been advised of their rights before giving the evidence. The court held that such warnings were not required since the privilege against self-incrimination did not protect the defendants from compulsion to provide such evidence. In the blood sample case, the defendant challenged only the validity of the seizure of blood samples under the fourth amendment, but the court did observe that *Schmerber*

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[81]No. 2-173-A-2 (Ind. Ct. App., June 28, 1973).

[82]384 U.S. 757 (1966).

[83]Hollars v. State, 286 N.E.2d 166, 168 (Ind. 1972).

[84]Heichelbech v. State, 281 N.E.2d 102, 104 (Ind. 1972).

[85]DeVaney v. State, 288 N.E.2d 732, 735 (Ind. 1972).

had specifically held that the taking of a blood sample did not violate the privilege against self-incrimination.

The Indiana Supreme Court also held in another case, in reliance upon *United States v. Wade*,[86] that a defendant may be required to state his name and address for identification purposes during the course of a lineup.[87] The First District Court of Appeals likewise relied upon *Schmerber* in holding that the privilege against self-incrimination does not protect an accused from being compelled to submit to fingerprinting and that fingerprint evidence is admissible even though the accused is not advised of his rights prior to the taking of the fingerprints.[88]

2. Testimony of a Defendant

Indiana, by statute, provides that a defendant is competent to testify in his own behalf but that his failure to do so cannot be commented upon or referred to in any manner during the course of a trial.[89] The statute specifically refers to the duties of the prosecuting attorney, the jury, and the judge when a defendant chooses not to testify but includes no provisions in this regard when a defendant chooses to testify. The supreme court dealt with this situation in *Sears v. State*[90] in which the court restated the basic rule that a defendant who chooses to testify is subject to the same rules which govern the cross-examination of any other witness. In *Sears*, the defendant was charged with burglary and testified at his trial that he and certain named friends entered the building in question to get warm and not with any intention to take any property from the building. On cross-examination, the prosecuting attorney asked if these friends were in the courtroom and if they still lived in the vicinity. The defendant argued that such questions were improper because the jury could have drawn an adverse inference from the defendant's failure to produce the friends as witnesses and that this would have shifted the burden of proof to the defendant. The supreme court concluded that the cross-examination was completely proper since the defendant was to be considered the same as any other witness after choosing to testify.

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[86]388 U.S. 218 (1967).

[87]Stephens v. State, 295 N.E.2d 622, 625 (Ind. 1973).

[88]Paschall v. State, 283 N.E.2d 801 (Ind. Ct. App. 1972).

[89]IND. CODE § 35-1-31-3 (1971).

[90]282 N.E.2d 807 (Ind. 1972).

The Indiana statute provides that the prosecuting attorney is not to comment upon or refer in his closing argument to the failure of a defendant to testify but contains no guidelines for determining what is or is not to be considered as such a comment. This question was considered by the supreme court in *Rowley v. State*[91] in which the prosecuting attorney, in closing argument, reviewed the various items of evidence concerning the guilt of the defendant and then asserted that there had not been one bit of evidence from the witness stand to indicate that the defendant was not guilty. The State contended that this statement was merely an assertion that the prosecution's own evidence was uncontradicted and undisputed, but the court concluded that the statement necessarily reflected upon the defendant's failure to testify since (1) the prosecution relied primarily upon the testimony of an accomplice and (2) the defendant was the only person who could have contradicted such testimony. In so doing, the court took the opportunity to discuss the guidelines to be used in determining whether a comment by a prosecuting attorney is, in fact, a comment upon a defendant's failure to testify. It recognized that some courts look to see whether the language is such that the jury would "naturally and necessarily" take the statement to be a comment on the failure to testify but concluded by stating a "preference" for the view that a comment is improper if it is "subject to an interpretation by a jury as a comment upon failure of a defendant to testify."[92] The conclusion was stated only as a preference, however, since the court held that the comment in this case was improper under either test.

Finally, in *Thorne v. State*,[93] the supreme court also considered the effect of the statutory provision that the trial court has the duty to give an instruction to the jury concerning a defendant's failure to testify. In the *Thorne* case, the trial court gave an instruction concerning the defendant's failure to testify although the defendant did not request such an instruction. On appeal, the defendant argued that the instruction should not have been given but the supreme court rejected this contention. It noted that no objection had been made to the instruction and concluded that "the instruction could only benefit the appellant, not harm him" and that it "was not erroneous to give the instruction, and in fact, would have been erroneous to refuse the instruction had

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[91] 285 N.E.2d 646 (Ind. 1972).

[92] *Id.* at 648.

[93] 292 N.E.2d 607 (Ind. 1973).

it been requested."[94] By these statements, the supreme court appears to suggest that such an instruction is proper whether or not the instruction is requested by the defendant and whether or not the defendant makes an objection to the instruction. In particular, the statement that "the instruction could only benefit the appellant, not harm him" would suggest that the instruction would be proper even over the defendant's objection.[95] Thus the Indiana Supreme Court appears to have joined with those courts which find the instruction to be proper even though the instruction arguably appears to direct the jury's attention to the fact that the defendant has failed to testify.[96]

3. Immunity

A general immunity statute was enacted during the 1969 session of the Indiana General Assembly.[97] This statute provides that a witness may be required to testify or produce evidence, provided that "he shall not be prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced." If the language of this statute is examined carefully, it would appear that the statute has embodied language that is drawn in part from a "transactional" immunity statute but that the statute is more nearly in the nature of a "use" immunity statute. For example, the present federal use immunity statute provides that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness . . . ."[98] On the other hand, one of the statutes which was replaced by the federal statute quoted above was a transactional statute which provided that "no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence . . . ."[99] The Indiana statute appears to be more nearly like the latter statute in the actual language that is used, but a literal reading would suggest that it is more

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[94]*Id.* at 609.

[95]For a similar holding, see Harvey v. State, 187 So. 2d 59 (Fla. App. 1966).

[96]*See generally* Annot., 18 A.L.R.3d 1335 (1968).

[97]IND. CODE § 35-6-3-1 (1971).

[98]18 U.S.C. § 6002 (1970).

[99]Act of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745 (repealed 1970).

nearly akin to a "use" statute since the statute provides that the witness cannot be prosecuted "for or on account of any answer given or evidence produced."

The statute has not been interpreted by any of the Indiana appellate courts, but the Third District Court of Appeals did consider the statute in *Millington v. State*[100] in reference to another matter and apparently treated the statute as a transactional statute. In *Millington*, the defendant was charged with burglary and safe stealing. An accomplice, who had admitted his participation in the offenses in a prior juvenile proceeding, was called as a witness against the defendant. The defendant objected to the testimony and the accomplice thereupon refused to testify. The prosecuting attorney then obtained an order for the accomplice to testify after the trial court had granted the accomplice "immunity from further prosecution." This order was upheld by the court of appeals which concluded that the grant of immunity was sufficient to require the accomplice to testify despite the Indiana statute providing that an accomplice is competent to testify only when he consents to testify.[101] The court did not rule directly upon the validity and nature of the immunity statute, however, but held only that the accomplice was properly ordered to testify after "being granted immunity from further prosecution."[102] Thus the question concerning the nature of the statute remains unanswered and its ultimate determination is especially important in view of the recent decisions of the United States Supreme Court holding that the fifth amendment privilege against self-incrimination does not require the granting of transactional immunity before a witness can be compelled to testify.[103]

E. Discovery

A few years ago, Indiana provided for only a limited amount of discovery in criminal cases.[104] Recent cases have changed this situation substantially and have made Indiana a leader in the field of criminal discovery. The decisions during the past year did not make any major changes in the area of discovery but tended to develop and clarify various aspects of the

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[100]289 N.E.2d 161 (Ind. Ct. App. 1972).

[101]IND. CODE § 35-1-31-3 (1971).

[102]289 N.E.2d at 166.

[103]Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. State Comm'n, 406 U.S. (1972), *noted in* 6 IND. L. REV. 356 (1972).

[104]*See* Orfield, *Criminal Discovery in Indiana*, 1 IND. LEGAL F. 117 (1967).

rules and procedures established by the landmark cases already handed down by the supreme court.

One of the earliest cases on criminal discovery was *Bernard v. State*[105] which provided for the discovery of the names of prospective prosecution witnesses. This decision provided that the defense could obtain an order directing the state to produce a list of prospective witnesses but did not specify the remedy if a prosecuting attorney failed to produce such a list. In particular, the decision did not give any guidance concerning the procedure to be followed when a prosecuting attorney, after producing an appropriate list prior to trial, called an additional witness at the time of trial. It has been argued that testimony of such witnesses should be excluded because of the State's failure to obey the order of discovery, and an early case appeared to support this position,[106] but the Indiana Supreme Court finally resolved the controversy by holding in *Pinkerton v. State*[107] that the defendant's proper remedy is a motion for a continuance.

Procedures for the discovery of pretrial statements made by prosecution witnesses were established in the case of *Antrobus v. State.*[108] This case, in effect, adopted the provisions of the fed-

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[105]248 Ind. 688, 230 N.E.2d 536 (1967).

[106]Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968). In the *Johns* case, the supreme court did reverse the conviction because two witnesses were permitted to testify even though their names were not included on the list of witnesses provided prior to trial. The court did indicate, however, that the defendant should have moved for a continuance under the circumstances.

[107]283 N.E.2d 376 (Ind. 1972). *See also* Hunt v. State, 296 N.E.2d 116 (Ind. 1973); Gregory v. State, 286 N.E.2d 666 (Ind. 1972); Luckett v. State, 284 N.E.2d 738 (Ind. 1972).

[108]253 Ind. 420, 254 N.E.2d 873 (1970). The court held that pretrial statements were discoverable after the defendant laid an appropriate foundation, showing that (1) the witness whose statement is sought has testified on direct examination, (2) a substantially verbatim transcript of the statement is probably within the control of the prosecution, and (3) the statement relates to matters covered in the testimony of the witness on direct examination. Once this foundation is laid, discovery must be granted unless the prosecution alleges that (1) there are no statements within the control of the State, (2) there is a necessity for keeping the contents of the statement confidential, or (3) portions of the statement are unrelated to the testimony of the witness and the State does not want to reveal such portions. The trial court must hold a hearing to resolve the first allegation but is to decide the second and third allegations by reviewing the statements in camera.

eral "Jencks Act."[109] During the past year, the supreme court decided a number of cases which suggest that the court will insist that a defendant adhere closely to the requirements set forth in *Antrobus* in order to obtain such discovery. In *Witherspoon v. State*,[110] the defendant made a motion for discovery after a police officer had testified on direct examination for the state. The defendant, by this motion, asked for discovery of "the police report of the incident for the purpose of impeachment." The supreme court held that discovery was properly denied because the defendant had failed to show that the witness had probably made such a report and that the prosecuting attorney probably had such a statement under his control. In *Blackburn v. State*,[111] the court recognized that grand jury testimony is discoverable under the *Antrobus* case but concluded that discovery was properly denied by the trial court since the defendant had made only a pretrial motion for such discovery and had not renewed his request after witnesses had testified for the state at the trial. A similar conclusion was reached in *Cherry v. State*[112] in which the defendant made a motion prior to trial for discovery of the names of prosecution witnesses and their statements and did not renew the request for statements after the testimony of the witnesses at the trial. In the *Cherry* case, however, the supreme court again indicated, as it had said previously in *Dillard v. State*,[113] that there might be an appropriate way in which to obtain such statements even prior to trial by the showing of an "*Antrobus* type" foundation, but the court did not give any more guidance here than in *Dillard* as to what such a foundation should be.[114]

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[109]18 U.S.C. § 3500 (1970).

[110]279 N.E.2d 543 (Ind. 1972).

[111]291 N.E.2d 686 (Ind. 1973).

[112]280 N.E.2d 818 (Ind. 1972).

[113]274 N.E.2d 387 (Ind. 1971). The court said:

> In *Antrobus*, we did not discuss the discovery of these statements prior to trial and that case does not purport to afford the right to pre-trial production of such statements. Under the *Bernard* principle, the trial court has the power to permit the pre-trial production of such statements upon the laying of an *Antrobus*-type foundation tailored to fit the pre-trial situation and such a trial court order would not be an abuse of discretion.

Id. at 393.

[114]The court in *Cherry* said:

> As an "Antrobus motion," it is clear that the defendant's motion was both premature and entirely too broad. Under proper circum-

In a related case, the Third District Court of Appeals held that it was improper for a defendant to be denied the right to depose a police officer prior to trial. In *Reynolds v. State*,[115] the defendant was charged with the possession of marihuana and sought to depose the police officer who was to be the chief witness for the prosecution. Since the State made no showing of a paramount state interest against the deposition, the court held that the request should have been granted. The court relied upon *Howard v. State*[116] and *Amaro v. State*[117] in which the supreme court had previously held that a defendant should be able to depose prosecution witnesses prior to trial. Thus, since a defendant can depose a prosecution witness prior to trial, it is only reasonable to conclude that the court will ultimately develop an appropriate procedure to permit pretrial discovery of any statements made by prosecution witnesses. Such a procedure would be less expensive and time-consuming than the taking of a deposition, and the production of a pretrial statement might then be used as a basis for denying any further request to depose the prosecution witness involved.

A somewhat different problem was confronted by the supreme court in *Zupp v. State*.[118] In that case involving kidnapping and rape charges, the prosecuting witness had submitted to a lie detector test. Thereafter, the defendant filed a motion for discovery of the results of the test. Although the results of such a test would appear to be similar to a pretrial statement of the witness, the court held that the discovery was properly denied because the results of the test would be inadmissible and would not be of assistance to the defendant in the preparation of his defense.[119]

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stances, the trial court might entertain a motion of this type at this stage of the proceedings. However, an "Antrobus type" foundation would have to be laid, and the material sought would have to fit the foundation.

280 N.E.2d at 820.

[115]292 N.E.2d 290 (Ind. Ct. App. 1973).

[116]251 Ind. 584, 244 N.E.2d 127 (1969).

[117]251 Ind. 88, 239 N.E.2d 394 (1968).

[118]283 N.E.2d 540 (Ind. 1972).

[119]Justice DeBruler, in a concurring opinion, contended that such tests should be discoverable under *Antrobus* as pretrial statements of the witness but concurred in the decision because the trial of this case occurred prior to the *Antrobus* decision. *Id.* at 543-44.

The basic requirements for the discovery of other items under the control of the state were set forth in *Dillard v. State*.[120] In that case, the supreme court stated that discovery should be permitted when the defendant designates certain items with reasonable particularity and shows that the items might be beneficial to the preparation of the defendant's case and the state fails to show some paramount interest in nondisclosure. This procedure was restated and followed in *Sexton v. State*[121] in which the court held that the defendant was entitled to obtain a copy of his own statement to the police because the state had failed to oppose the motion for discovery.[122]

F. Guilty Pleas

Guilty pleas account for the great bulk of criminal convictions and the supreme court and court of appeals gave considerable attention during the past year to the procedures to be followed in the taking of guilty pleas. In *Brimhall v. State*,[123] the supreme court virtually adopted the American Bar Association suggested standards for the taking of a guilty plea,[124] and clarified the statement made two years earlier in *Wright v. State*[125] that the purpose of a hearing on a plea of guilty is for the trial court "to determine whether or not the appellant is fully apprized of the consequences of his plea of guilty and also to determine whether or not there is factual evidence that the crime to which he has attempted to plead guilty was in fact committed."[126] Although the statement in the *Wright* case was not a direct holding con-

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[120]274 N.E.2d 387 (Ind. 1971).

[121]276 N.E.2d 836 (Ind. 1972).

[122]The court also held that the State should have produced a diagram of the scene of the crime made by the police shortly after the offense although Chief Justice Arterburn, in a dissenting opinion, suggested that the diagram was a "work product" of the police and should not be discoverable unless reciprocal discovery was provided to the State. *Id.* at 840.

[123]279 N.E.2d 557 (Ind. 1972).

[124]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY §§ 1.4-.7 (Approved Draft 1968).

[125]255 Ind. 292, 264 N.E.2d 67 (1970). In *Wright*, the trial court rejected an offer to plead guilty after holding a hearing on the plea, at which witnesses for the State testified concerning the offense. When the defendant thereupon stated that the testimony of the witnesses was untrue, the trial court rejected the plea and set the case for trial. The supreme court rejected the defendant's argument that this action was tantamount to a finding that the defendant was not guilty.

[126]*Id.* at 295-96, 264 N.E.2d at 70.

cerning the duties of a trial court at a hearing on a guilty plea, the supreme court confronted the issue squarely in *Brimhall* and discussed the duties of the trial court at length. In its discussion, the supreme court emphasized that a defendant must be fully advised of his rights under both the federal and state constitutions, that the trial court should ascertain that a factual basis exists for the taking of the plea, and that a record must be made to show that the plea is being entered knowingly and voluntarily in accordance with the earlier decision of the United States Supreme Court in *Boykin v. Alabama*.[127] Although the opinion does not state directly that the trial court must determine that a factual basis exists for the plea, the court did emphasize that the lack of such a determination was a factor for reversing the trial court in *Brimhall*. Furthermore, the court quoted the American Bar Association's minimum standards for pleas of guilty and recommended them as "guidelines" for trial courts to follow,[128] and these standards provide for the determination of a factual basis before a guilty plea is accepted.[129]

If the supreme court intended to adopt a requirement concerning the determination of a factual basis, the *Brimhall* decision does not fully disclose the nature of such a determination or the extent of the evidence which should be introduced. In the *Wright*

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[127]395 U.S. 238 (1969). In Conley v. State, 284 N.E.2d 803 (Ind. 1972), the Indiana Supreme Court concluded that *Boykin v. Alabama* should not be given retroactive effect. The court thus made a distinction between defendants represented by counsel and defendants not represented by counsel and held that a trial court, prior to the *Boykin* case, had no duty to advise a defendant of his rights at a guilty plea hearing at which the defendant was represented by counsel. The court did recommend, however, that trial courts follow rule 11 of the Federal Rules of Criminal Procedure in taking guilty pleas from defendants, whether represented by counsel or not. This rule would require the trial court to address the defendant personally to determine that the plea is being entered voluntarily and with an understanding of the nature of the charge and the consequences of the plea. The rule would also require the trial court to determine that a factual basis existed for the plea.

[128]279 N.E.2d at 563 n.1. In Conley v. State, 284 N.E.2d 803, 808 (Ind. 1972), the Indiana Supreme Court quoted rule 11 of the Federal Rules of Criminal Procedure and said, "We feel, however, that the common law, as expressed in the cases of this state, is in substantial conformity with the federal rule." Although the court was concerned only with the question of a trial court's duty to advise a defendant of his rights, the rule does refer also to the duty of a trial court to determine a factual basis for a guilty plea.

[129]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 1.6 (Approved Draft 1968).

case, witnesses actually testified at the hearing on the guilty plea,[130] but the court in *Brimhall* said only that there was "no evidence that the appellant understood the facts to which he was admitting nor that he understood the law in relation to those facts" and that there was "no evidence in this case that any attempt was ever made to ascertain the appellant's version of the events in question, and to analyze that version in relation to the formal charge."[131] Since the thrust of the opinion is with reference to the defendant's understanding of the facts and the law, the sugestion appears to be that the trial court may make the factual determination by questioning the defendant himself without requiring that any additional evidence be presented either by the defendant or by the prosecuting attorney. This, in fact, is the procedure which was codified into statutory form during the 1973 session of the Indiana General Assembly as follows:

> The court shall not enter judgment upon a plea of guilty unless it is satisfied from its examination of the defendant that there is a factual basis for the plea.[132]

The *Brimhall* decision was followed by the Third District Court of Appeals in *Lovera v. State*[133] in which a guilty plea was set aside because the trial court failed to make a proper record to show that the defendant was properly advised of his constitutional rights and entered his guilty plea knowingly and voluntarily. The Second District Court of Appeals likewise followed the *Brimhall* decision, setting aside a guilty plea in *Bonner v. State*[134] because the record did not show that the defendant was specifically advised of his rights to confront his accusers and his rights against compulsory self-incrimination. The court elaborated at length upon the *Brimhall* decision, giving special emphasis to the types of warnings and the nature of the advice that must be given to a defendant before a guilty plea can be accepted. In fact, the court concluded that the defendant when entering a guilty plea, must be advised of each of his constitutional rights with as much specificity as required by *Miranda v. Arizona*[135] for defendants

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[130]255 Ind. at 295-96, 264 N.E.2d at 70.

[131]279 N.E.2d at 564-65.

[132]Ind. Pub. L. No. 325, § 4(1)(4)(b) (April 23, 1973).

[133]283 N.E.2d 795 (Ind. Ct. App. 1972).

[134]297 N.E.2d 867 (Ind. Ct. App. 1973).

[135]384 U.S. 436 (1966).

undergoing custodial interrogation.[136] The Third District Court of Appeals added another decision to this group of cases by holding in *Taylor v. State*[137] that a trial judge may use a printed form to advise a defendant of his rights at a guilty plea hearing but may not rely upon the use of such a form without also determining for himself that the defendant fully understands what is printed on such a form.

G. Insanity

Two landmark decisions concerning Indiana insanity procedures were handed down during the past year, one by the United States Supreme Court and the other by the Indiana Supreme Court. The first concerned the procedures for determining a defendant's competency to stand trial and the second dealt with the procedures to be followed after a defendant has been acquitted because of insanity.

1. Competency to Stand Trial

In *Jackson v. Indiana*,[138] the United States Supreme Court cast doubt upon the constitutionality of the Indiana statutory procedures[139] for determining the competency of a defendant to stand trial. In *Jackson*, the defendant was a mentally defective deaf mute who could not read, write, or otherwise communicate except through limited sign language. After the defendant had entered pleas of not guilty to two robbery charges, the trial court conducted a competency hearing pursuant to the Indiana statutory procedure, found that the defendant lacked "comprehension sufficient to make his defense," and ordered him committed until the Department of Mental Health certified that "the defendant [was] sane."[140] At the hearing, two experts testified that the defendant's condition probably would never improve. As a result, the defendant contended that the commitment violated his right to equal protection of the law and basic due process because he was, in effect, given a life sentence without a proper hearing. The Indiana Supreme Court rejected these contentions, concluding that the language in the statute in question was sufficiently broad to cover persons who were not actually insane, that the Department of

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[136]297 N.E.2d at 874.

[137]297 N.E.2d 896 (Ind. Ct. App. 1973).

[138]406 U.S. 715 (1972).

[139]IND. CODE § 35-5-3-2 (1971).

[140]406 U.S. at 719.

Mental Health had authority to commit the defendant to an appropriate institution, and that the state had the authority under the police power to adopt a statute to cover situations such as this.[141] This decision was reversed by the United States Supreme Court which agreed with the defendant's contentions. With reference to the equal protection argument, it agreed that the defendant was committed under a less stringent standard than that used to commit feeble-minded persons under the Indiana civil statutes and was subject to more stringent standards with reference to his release. For example, under the criminal statute, he was committed for incapacity to stand trial and could be released only when he regained such capacity; under the civil statute, he could be committed only if shown to be mentally ill and in need of care, treatment, training, or detention, and could be released whenever his condition justified it or when release would be in his best interest. The Court concluded that the existence or nonexistence of pending criminal charges should not be a sufficient basis to justify different standards for commitment of persons for incompetency. With reference to the due process argument, the Court also agreed that the indefinite commitment of the defendant solely because of his incapacity to stand trial violated fundamental due process and that such a person cannot be held on that basis longer than the time necessary to determine whether he will probably regain his capacity in the foreseeable future. If so, he may be held on that basis, depending upon his continued progress toward regaining his capacity to stand trial. If not, the State must promptly institute the usual civil commitment proceedings.

The Indiana Supreme Court decided two other cases during the term which are of importance with reference to the competency issue. In *Cook v. State,*[142] the court emphasized that a defendant is not entitled to a competency hearing merely upon his own request but that he must present sufficient evidence to raise a bona fide doubt as to his competency before a hearing is required. In *Tinsley v. State,*[143] the court concluded, however, that a competency hearing must be held whenever the defendant does produce sufficient evidence to cast doubt upon his competency to stand trial, even if the evidence is produced after the conviction and sentencing of the defendant. In *Tinsley,* the defendant was convicted and thereafter filed a belated motion to correct errors, including a motion to

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[141]Jackson v. State, 253 Ind. 487, 255 N.E.2d 515 (1970).

[142]284 N.E.2d 81 (Ind. 1972).

[143]298 N.E.2d 429 (Ind. 1973).

hold a hearing in support of his competency to stand trial. The defendant filed a copy of a previous court order which had adjudged the defendant incapable of managing his estate because of mental illness and had appointed a guardian for him. This was held to be sufficient to require a hearing on his competency to stand trial, and the court specifically noted that the issue had not been waived even though it had not been raised prior to or during the trial.

2. Procedure After Acquittal

The *Jackson* case was followed shortly thereafter by *Wilson v. State*,[144] a decision in which the Indiana Supreme Court held that the Indiana criminal procedures for committing defendants after an acquittal because of insanity were unconstitutional. Under the Indiana statute,[145] a hearing was to be held after an acquittal because of insanity and the trial court was authorized to commit the defendant to the Department of Mental Health (1) if the court found that the defendant was insane at the time of the trial or (2) if the court found that the defendant was sane at the time of the trial but that the recurrence of an attack of insanity was highly probable. A person committed under this procedure had the right to petition the trial court for a discharge every six months thereafter and was to be released whenever his hospital superintendent certified that he had regained his sanity and that a recurrence of insanity was improbable.[146]

In *Wilson*, the supreme court held that the Indiana criminal statutes denied criminal defendants the equal protection of the law and that defendants who were acquitted because of insanity were entitled to have the issue of their mental competency determined by civil commitment proceedings. The supreme court reviewed the Indana criminal and civil commitment procedures and noted a number of substantial differences, both before and after commitment. The court, for example, noted (1) that the issue of mental competency is to be determined by a jury in a civil proceeding but not in a criminal proceeding and (2) that the person committed civilly may be discharged at any time within the discretion of the superintendent of his institution whereas a person committed in a criminal proceeding may be released only

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[144]287 N.E.2d 875 (Ind. 1972), *noted in* 6 IND. L. REV. 300 (1972).

[145]IND. CODE § 25-5-3-1 (1971).

[146]*Id.* § 35-5-2-4. At the time of the *Wilson* insanity hearing, the statute provided for a review of the commitment every two years after the commitment.

upon an order of the court and may not petition for release except at specified intervals of time after the commitment.

This decision has left a major gap in Indiana insanity procedures, and the court's one suggestion concerning this gap has raised more questions than it has resolved. Since the effect of this decision might be to release an insane and potentially dangerous defendant into the community following an acquittal because of insanity, the court suggested that "[i]f the State is concerned about the potential danger to the defendant or the community in the event of an acquittal upon the criminal charge, the procedure for civil commitment should be commenced . . . in advance of the verdict."[147] Although this appears to be a plausible suggestion, the court did not make any suggestion as to the manner in which the civil procedure should be instituted. Prosecuting attorneys would be reluctant to institute the proceeding because of the possibility of civil liability for such action and because of the possible effect of their inconsistent action upon the outcome of the criminal case itself. For example, if a prosecuting attorney who has been arguing to the jury that a defendant is sane and guilty of a particular offense should suddenly change his mind because of the extended nature of the jury's deliberations, his subsequent inconsistent action in instituting civil proceedings prior to the return of the verdict might be a fact that should be brought to the attention of the jury while deliberations are still continuing. On the other hand, the trial court might not have authority to institute civil commitment proceedings on its own motion and might not even have authority to conduct such proceedings. Even if the trial court had such authority, however, the decision of the trial court to institute such proceedings might be construed in some way to require a directed verdict in favor of the defendant in the criminal action or at least to require that the criminal proceeding be set aside because of the doubt in the court's mind as to the sanity of the defendant. Other persons might be reluctant to rush into a court to institute such proceedings either because of the possibility of civil liability or because of a lack of time to become fully acquainted with the facts of the case to determine whether to institute such proceedings. Such questions created by the *Wilson* case remain to be resolved, either by further court action or by action of the Indiana General Assembly.

3. Insanity Defense

The Indiana appellate courts decided a number of cases during the past year concerning the defense of insanity. In *Young v.*

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[147] 287 N.E.2d at 881.

State,[148] the supreme court reviewed the burden of proof in insanity cases and held that the presumption of sanity is sufficient to establish a prima facie case for the State so that the State does not have to introduce evidence of sanity in its case in chief. The court also held that the burden of going forward with evidence of insanity rests upon the defendant, that the presumption of sanity disappears when competent evidence of insanity has been introduced by the defendant, and that the burden is on the State to prove the defendant's sanity at the time of the offense beyond any reasonable doubt when the defendant has introduced evidence of insanity. Four of the justices agreed that the defendant's burden of going forward is satisfied when the defendant has introduced any competent evidence, either direct or circumstantial, on the issue of insanity and overruled *Berry v. State*[149] which had required that some "credible" evidence be introduced by the defendant.

The supreme court also held in *Smith v. State*[150] that an expert may give an opinion as to sanity based in part upon hearsay records and reports if such records and reports are customarily relied upon by others in his profession. In the *Smith* case, two court-appointed psychiatrists examined the defendant prior to trial and later reviewed two reports prepared by staff members of the hospital where the defendant was kept until the time of the trial. A unanimous court concluded that the psychiatrists were properly permitted to give their opinions at the trial even though they relied in part upon the hospital reports and the staff members were not called to testify concerning such reports.

The test for determining insanity was considered by the First District Court of Appeals in *Faught v. State.*[151] In that case, two defense experts testified that the defendant had committed armed robbery at a time when he was under a compulsion to obtain drugs because of addiction to heroin. This testimony was stricken by the trial court on the basis that drug addiction is not a defense to the commission of a crime. After reviewing the test for insanity as discussed in *Hill v. State,*[152] the court of appeals held that the testimony should not have been stricken because the jury, in

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[148]280 N.E.2d 595 (Ind. 1972).

[149]251 Ind. 494, 242 N.E.2d 355 (1968).

[150]285 N.E.2d 275 (Ind. 1972).

[151]293 N.E.2d 506 (Ind. Ct. App. 1973).

[152]252 Ind. 601, 251 N.E.2d 429 (1969).

deciding the issue of insanity, should have been permitted to consider all qualified medical testimony concerning the defendant's state of mind at the time of the offense.

H. Assistance of Counsel

1. Right to Counsel

Various decisions of the Indiana appellate courts during the past year considered the defendant's right to counsel, covering the right to counsel during the full range of the criminal covering the right to counsel during the full range of the criminal process from the pretrial stage to posttrial proceedings. The cases concerning the right to counsel during a lineup or photographic identification have already been discussed above with reference to such identification procedures.[153] The right to counsel at the time that a defendant is required to produce nontestimonial evidence was considered in *Hollars v. State*[154] in which the Indiana Supreme Court concluded that there is no right to the presence of an attorney at the time that handwriting exemplars are produced. In *McGowan v. State,*[155] the defendant argued that a custodial search is a critical stage of a criminal prosecution and that he was entitled to the presence of an attorney during a custodial search conducted while being booked at the city jail. Instead of holding that the defendant had no such right to an attorney because only nontestimonial evidence was obtained during the search, as suggested by the *Hollars* case, the Second District Court of Appeals held that the defendant had no right to the presence of an attorney because formal charges had not been filed against him at the time of the search. In so doing, the court relied upon the *Kirby* case.

In *Anderson v. State,*[156] the First District Court of Appeals held that a defendant is not necessarily entitled to an attorney at his initial appearance before a magistrate or court if the court acts promptly to determine the defendant's right to counsel and to provide counsel as necessary or appropriate. The right of a defendant to have counsel at an arraignment was recognized in a number

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[153] *See* note 41 & accompanying text *supra.*

[154] 286 N.E.2d 166, 168 (Ind. 1972). *See* note 83 & accompanying text *supra* for the discussion concerning compulsion to produce nontestimonial evidence.

[155] 296 N.E.2d 667 (Ind. Ct. App. 1973).

[156] 291 N.E.2d 579 (Ind. Ct. App. 1973).

of cases.[157] This right was given a special emphasis in *Hall v. State*[158] in which the First District Court of Appeals held that an arraignment is a critical stage of the criminal proceeding requiring the presence of an attorney even when the defendant enters a plea of not guilty.

Several cases were decided with reference to the right to counsel during the trial stage. One decision, *Lovera v. State,*[159] noted that the right to counsel exists even in misdemeanor cases under the Indiana constitution, whereas the United States Supreme Court had held just two days earlier in *Argersinger v. Hamlin*[160] that the right to counsel exists in a misdemeanor case under the federal constitution only if the defendant is incarcerated as a result of the prosecution. In *State v. Irvin,*[161] the supreme court emphasized that an indigent defendant has no right to choose his appointed counsel and held that the appointment of counsel is wholly within the discretion of the trial court. The court concluded that an indigent defendant cannot be required to accept the services of the appointed counsel but must represent himself if he does not accept such counsel or otherwise obtain representation. When an indigent defendant properly waives counsel and chooses to represent himself, however, he must accept the consequences of his action and cannot thereafter allege that he was prejudiced by his own incompetence as an attorney.[162]

With reference to appeals, the supreme court held that an indigent on an appeal could not withdraw as counsel even if he appointed to represent him and cannot insist that the same person who represented him at the trial stage be appointed to represent him on appeal.[163] On the other hand, the Second District Court of Appeals held that a public defender appointed to represent an indigent defendant has no right to choose the attorney who is considered the appeal to be completely frivolous.[164]

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[157]Grimes v. State, 278 N.E.2d 271 (Ind. 1972); Darmody v. State, 294 N.E.2d 835 (Ind. Ct. App. 1973); Hall v. State, 288 N.E.2d 787 (Ind. Ct. App. 1972).

[158]288 N.E.2d 787 (Ind. Ct. App. 1972).

[159]283 N.E.2d 795 (Ind. Ct. App. 1972).

[160]407 U.S. 25 (1972).

[161]291 N.E.2d 70 (Ind. 1973).

[162]Haynes v. State, 293 N.E.2d 204 (Ind. Ct. App. 1973).

[163]Moore v. State, 293 N.E.2d 28 (Ind. 1973); State *ex rel.* Shorter v. Allen Superior Court, 292 N.E.2d 286 (Ind. Ct. App. 1973).

[164]Dixon v. State, 284 N.E.2d 102 (Ind. Ct. App. 1972).

Finally, the supreme court held in *Russell v. Douthitt*[165] that a parolee is not entitled to be represented by an attorney at a parole revocation hearing and thereby purported to resolve an issue specifically left unanswered by the United States Supreme Court the previous year in *Morrissey v. Brewer*.[166] This decision has necessarily been modified, however, by the more recent opinion of the United States Supreme Court in *Gagnon v. Scarpelli*[167] which held that the right to counsel at probation and parole revocation hearings should be determined according to the circumstances on a case by case basis.

2. Incompetency of Counsel

The Indiana appellate courts continued during the past term to impose a heavy burden upon any defendant who sought to overturn his conviction on grounds that his counsel was incompetent. The various cases reaffirm the long-standing Indiana position that an attorney, whether appointed or retained, is presumed to be competent.[168] This presumption may be overcome only if the defendant is able to prove that his attorney's acts or omissions transformed the proceedings into a "mockery" which is found to be "shocking to the conscience" of the court.[169] Reviewing courts frequently expressed a reluctance to "second guess" counsel on matters of trial strategy or tactics.[170] For example, in *Blackburn v. State*,[171] the defendant alleged that his attorney made no effort to suppress or object to the admission of certain unconstitutionally seized evidence, including incriminating statements by the defendant and an unfinished letter from the defendant to his wife. The Indiana Supreme Court held that since both the statement and the letter contained material which helped to explain the defend-

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[165]291 N.E.2d 361 (Ind. 1973), *noted in* 6 IND. L. REV. 768 (1973).

[166]408 U.S. 471 (1972).

[167]93 S. Ct. 1756 (1973).

[168]Blackburn v. State, 291 N.E.2d 686 (Ind. 1973); State v. Irvin, 291 N.E.2d 70 (Ind. 1973); Kelley v. State, 287 N.E.2d 872 (Ind. 1972); Conley v. State, 284 N.E.2d 803 (Ind. 1972).

[169]State v. Irvin, 291 N.E.2d 70, 73 (Ind. 1973); Kelley v. State, 287 N.E.2d 872, 874 (Ind. 1972); Wilson v. State, 291 N.E.2d 570, 573 (Ind. Ct. App. 1973).

[170]Kidwell v. State, 295 N.E.2d 362, 364-65 (Ind. 1973); Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972).

[171]291 N.E.2d 686, 696-97 (Ind. 1973).

ant's actions and bolstered his insanity defense, the attorney's failure to object to the admission of the evidence was a matter of trial strategy. Thus the cases indicate that an attorney in Indiana is expected to demonstrate only reasonable skill and diligence, not perfection, in order to be considered competent.[172]

I. Habitual Criminal Prosecutions

Habitual criminal prosecutions are authorized in Indiana whenever a person is charged with a felony "after having been twice convicted, sentenced and imprisoned" for prior felonies.[173] During the past term, the Indiana Supreme Court introduced the concept of two-stage jury trials into Indiana criminal procedure by holding that a defendant in a habitual criminal prosecution is entitled to a two-stage trial. In *Lawrence v. State*,[174] the court unanimously held that the principal or substantive charge must be tried first and that the habitual criminal charge is then to be tried in a second stage of the trial so that the jury will not be aware of the defendant's prior convictions while determining his guilt or innocence on the principal charge. The United States Supreme Court has held, however, that the federal constitution does not require the states to hold such two-stage trials,[175] and the Indiana Supreme Court has upheld the validity of one-stage trials in previous cases.[176]

In *Cooper v. State*,[177] the Indiana Supreme Court also reviewed the language of the habitual criminal statute and emphasized that a person may be prosecuted under that statute only when the commission of the second felony was subsequent to the conviction and imprisonment for the first felony and when the commission of the third felony was subsequent to the conviction and imprisonment for the second felony. In *Cooper*, the defendant

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[172]This standard would appear to be in accord with federal constitutional standards as suggested by the recent decision of the United States Supreme Court in Tollett v. Henderson, 95 S. Ct. 1602 (1973).

[173]IND. CODE §§ 35-8-8-1, -2 (1971).

[174]286 N.E.2d 830 (Ind. 1972).

[175]Spencer v. Texas, 385 U.S. 554 (1967).

[176]Kelley v. State, 204 Ind. 612, 185 N.E. 453 (1933). The Indiana Supreme Court upheld the validity of the one-stage trial in Johnson v. State, 252 Ind. 70, 75-77, 245 N.E.2d 659, 661-62 (1969), but cast doubt upon the continued validity of the procedure by stating that it would not review the issue because it had not been raised properly by the defendant.

[177]284 N.E.2d 799 (Ind. 1972).

was arrested and charged with an offense of burglary. He thereafter escaped from jail while being detained for trial. Upon being rearrested, he pleaded guilty to charges of burglary and escape and was sentenced to prison for both offenses, the sentences to run consecutively. After being released from prison, he committed another burglary and was charged with an offense of burglary and with being a habitual criminal. The supreme court held that the defendant could not be convicted of the habitual criminal charge because the conviction for escape could not be considered as a second conviction under the habitual criminal act. The court thus emphasized that the habitual criminal penalty is not to be imposed until a defendant, by separate convictions, sentencings, and imprisonments, has been given due warning concerning the consequences of his persistence in criminal conduct.

J. Sentencing

By statute, Indiana provides that appeals from certain courts, including justice of the peace, municipal, and magistrate courts, are to be taken to the criminal or circuit courts of the respective counties.[178] With certain exceptions,[179] such appeals are to be determined by a trial de novo.[180] In *Anderson v. State*,[181] the First District Court of Appeals held that the penalty imposed after a trial de novo could not be greater than the penalty originally imposed at the first trial. The significance of this decision is in the fact that the court of appeals elected to follow an earlier decision of the Indiana Supreme Court instead of following a more recent decision of the United States Supreme Court which permitted a contrary conclusion.

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[178]IND. CODE § 35-1-13-3 (1971). *See also id.* §§ 18-1-14-2, 33-7-1-6, 33-11-1-55.

[179]Appeals from the Marion Municipal Court to the Marion Criminal Court are not determined by a trial de novo. *Id.* § 33-6-1-9.

[180]Hensley v. State, 251 Ind. 633, 635, 244 N.E.2d 225, 226 (1969).

[181]293 N.E.2d 222 (Ind. Ct. App. 1973).

In Oliver v. State, 289 N.E.2d 545 (Ind. Ct. App. 1972), the defendant was convicted in the Fort Wayne City Court of selling obscene magazines and was sentenced to pay a $500.00 fine and to serve ten days in the Allen County Jail. After an appeal and a trial de novo in the Allen Circuit Court, he was again convicted and was then sentenced to pay a $1000.00 fine and to serve thirty days in the Allen County Jail. On appeal, the State conceded in oral argument that the punishment imposed by the Allen Circuit Court was erroneous. The Third District Court of Appeals noted that this concession was made by the State but limited its opinion to another issue in the csae which required reversal of the defendant's conviction.

In 1969, the United States Supreme Court held in *North Carolina v. Pearce*[182] that a trial judge could not impose a more severe penalty on a defendant after a retrial following an appeal unless the judge stated the reasons for the increased penalty and based his reasons upon identifiable conduct of the defendant occurring after the prior sentence. Thereafter, the Indiana Supreme Court concluded in *Eldridge v. State*[183] that the *Pearce* decision also applied to sentences imposed following an appeal and a trial de novo in the criminal or circuit courts. Other jurisdictions disagreed with this conclusion, and the United States Supreme Court finally resolved the issue by holding in *Colten v. Kentucky*[184] that the *Pearce* rule does not apply in cases involving a trial de novo.

In the *Anderson* case, the First District Court of Appeals relied upon *Eldridge* without even referring to the *Colten* case. It might be argued that the court of appeals was required to follow the Indiana Supreme Court decision unless and until the latter court reversed itself, but the court of appeals did not even discuss the question. Furthermore, the same court of appeals took the opposite approach just four months later when it held in *Snipes v. State*[185] that a defendant has no right to an attorney at a line-up held before formal charges have been filed. In the latter decision, the court relied upon the United States Supreme Court decision in *Kirby v. Illinois*[186] without referring in any way to the decision of the Indiana Supreme Court in *Martin v. State*[187] which appears to be to the contrary.

If the *Anderson* decision is to be followed in Indiana, it should be noted that the decision must be read in conjunction with the *Eldridge* and *Pearce* decisions in order to have a complete statement of the holding concerning resentencing. The *Anderson* decision, standing alone, appears to hold without any qualifications that a penalty imposed after a trial de novo may not be greater than the penalty originally imposed at the first trial. Since *Anderson* relied upon *Eldridge* and *Pearce,* the holding would appear to be qualified so as to permit an increased penalty provided that the trial record includes reasons for the increased penalty based upon

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[182]395 U.S. 711, 726 (1969).

[183]267 N.E.2d 48 (Ind. 1971).

[184]407 U.S. 104 (1972).

[185]298 N.E.2d 503 (Ind. Ct. App. 1973).

[186]406 U.S. 682 (1972).

[187]279 N.E.2d 189 (Ind. 1972).

identifiable conduct occurring after the imposition of the first sentence. The continued validity of the *Anderson* decision has been placed in doubt, however, by another decision of the United States Supreme Court which was decided subsequent to *Anderson*. In *Chaffin v. Stynchcombe*,[188] the Supreme Court held that the *Pearce* rule does not apply when a jury imposes the penalty after a retrial following an appeal, provided that the jury is not informed of the prior sentence. Since the penalty in the *Anderson* case was, in fact, imposed by the jury after the trial de novo, the *Anderson* ruling is clearly no longer required by any of the decisions of the United States Supreme Court.

VII. Domestic Relations*

A. Adoption

The "best interests of the child" continues to be the polestar of adoption proceedings.[1] But prior to reaching this consideration, the trial court normally determines whether or not consent of the parties is required in order to grant the adoption petition. Before the 1969 amendment to Indiana's adoption law,[2] the Indiana Supreme Court was faced with the question of whether or not the refusal to pay support payments constituted a waiver of the consent required in adoption proceedings.[3] The court had answered this issue in the affirmative.

In *Jackson v. Barnhill*[4] the respondent-father refused to pay support to his former wife and children on the grounds that his

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[188]411 U.S. 903 (1973).

*David C. Campbell, Lawrence D. Giddings, James G. Scantling, Joseph A. Walsh.

[1]Ind. Code § 31-3-1-6 (1971).

[2]Prior to the amendment, the trial court had discretionary authority to find that failure to provide support payments for a period of one year was a waiver of the consent required in adoption proceedings. Under the 1969 amendment, specific requirements are laid out in order to find waiver: payments required by law or judicial decree, ability of the father to make the payments, and willful refusal to make the same. *Id.* § 31-3-1-6(g)(1).

[3]Reynard v. Kelly, 252 Ind. 632, 251 N.E.2d 413 (1969).

[4]277 N.E.2d 162 (Ind. 1972).

former wife was living with another man. Respondent contended that under these facts no wilful waiver of consent could be found merely because he failed to provide child support payments. He further alleged that his former wife was not a fit mother for the children.[5] The court held that prior case law was equally applicable to the amended statute and that when a parent is financially able to make support payments and refuses to do so, the trial court is justified in finding a wilful refusal. In such a case, there has been a waiver of the consent required for adoption.[6]

Following a precedent set by the supreme court in 1946,[7] the court of appeals has held that welfare reports may not be considered by the trial court in determining the best interests of the child in a contested adoption proceeding.[8] The appellate court reiterated the rule that welfare reports may only be considered as evidence where the adoption is an *ex parte* proceeding.[9] When the adoption is contested, the proceeding becomes an adversary one, and as such requires the observance of elementary rules of evidence.[10]

B. Divorce

1. Doctrines of Indivisibility and Equitable Estoppel

In 1970, Eugene Alderson, the appellant, filed a suit for divorce, and Myrtle Alderson, the appellee, cross-complained, also seeking an absolute divorce. The trial court found for the appellee on her cross-complaint and granted her an absolute divorce and awarded her custody of their minor child. The trial court also ordered that the appellee should receive certain real estate and household goods. On appeal the appellant contested neither the validity of the divorce decree nor the award of custody, but rather alleged that the trial court had abused its discretion in determining the amount of the property settlement awarded to the appellee. While the appeal was pending, the appellant remar-

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[5]The wife was not a party to the action and, therefore, this allegation was not properly in issue.

[6]The court stated that "we cannot presume the legislature intended to vest natural fathers with the ability to unilaterally pass judgment . . ." as to when not to comply with support orders. 277 N.E.2d at 164.

[7]Attkisson v. Usrey, 224 Ind. 155, 65 N.E.2d 489 (1946).

[8]Jeralds v. Matusz, 284 N.E.2d 99 (Ind. Ct. App. 1972).

[9]*Id.* at 101-02.

[10]*In re* Adoption of Force, 126 Ind. App. 156, 131 N.E.2d 157 (1956).

ried. The appellee then filed a motion to dismiss the appeal on the ground that the appellant, by his remarriage, had recognized the validity of the judgment below.

The court of appeals sustained the motion to dismiss, relying on *Sidebottom v. Sidebottom,*[11] and held that the doctrines of indivisibility and equitable estoppel prevented appellant from challenging the trial court's judgment.[12] The Indiana Supreme Court, in an unanimous decision, overruled *Sidebottom,* and held that the doctrine of indivisibility is no longer viable law.[13] Therefore, since appellant did not question the validity of the marital dissolution, he was not estopped to challenge the property settlement portion of the decree even though he had remarried.

The doctrine of estoppel is founded upon the equitable concept that one who accepts the benefits of a judgment is estopped from further questioning the fairness of that judgment.[14] As applied to divorce proceedings, the concept is that one who acknowledges the validity of a divorce decree by remarrying is estopped from denying the validity of the dissolution of the prior marital relationship on appeal.[15] This application of the doctrine serves logical ends, because "it would be ludicrous to permit a party . . . to have the second marriage, on his motion, rendered bigamous on appeal."[16]

The doctrine of indivisibility has its basis in the concept that each part of the trial court's judgment in a divorce proceeding, including marital status, property settlement, alimony, and child custody, is so integral to the judgment as a whole that no part thereof can be considered on appeal without considering the whole.[17] When the doctrines of estoppel and indivisibility

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[11]249 Ind. 572, 233 N.E.2d 667 (1968).

[12]Alderson v. Alderson, 274 N.E.2d 710 (Ind. Ct. App. 1971), *rev'd,* 281 N.E.2d 82 (Ind. 1972).

[13]Alderson v. Alderson, 281 N.E.2d 82 (Ind. 1972).

[14]274 N.E.2d at 711 (Staton, J., dissenting).

[15]*Id.* This doctrine was first established in Indiana in Garner v. Garner, 38 Ind. 139 (1871). The court cited no authority for this proposition and decided the case on its merits. Thus, the court's pronouncement of the estoppel doctrine was merely dictum. *See also* Stephens v. Stephens, 51 Ind. 542 (1875).

[16]281 N.E.2d at 83.

[17]The doctrine has its origins in dicta found in Rariden v. Rariden, 33 Ind. App. 283, 70 N.E. 398 (1904).

are applied in conjunction with each other, remarriage by one of the parties to the divorce proceeding completely bars an appeal by that party of any part of the divorce judgment.[18] This was the rule established in *Sidebottom*[19] and seemingly applied to the situation which confronted the court in *Alderson v. Alderson.*[20]

In *Alderson,* the court noted that the doctrine of indivisibility, summarily applied, produced results "which [were] neither logical nor reasonable," and that the consequences of applying the doctrine of estoppel in conjunction with the doctrine of indivisibility were "severe results which border on absurdity."[21] The court hypothesized that the only logical reason for the adoption of the rule was that, at that time, it was believed the state had an overriding interest in preserving its citizens' marital status and was thereby obligated to discourage divorce. Furthermore, the origins of the rule as well as the authority for it were somewhat questionable."[22]

The court stated that the general application of the doctrine of estoppel as set forth in *Sidebottom* was restricted somewhat in *O'Connor v. O'Connor.*[23] In that case the court held that although the appellant had accepted the benefits of the divorce decree by selling an automobile that had been awarded him, this was not such an unqualified acceptance of the decree as to preclude any appeal questioning the validity of the divorce. The *Sidebottom* decision was distinguished on the ground that the appel-

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[18]*See* Sidebottom v. Sidebottom, 249 Ind. 572, 233 N.E.2d 667 (1968); Finke v. Finke, 135 Ind. App. 65, 191 N.E.2d 516 (1963); Smith v. Smith, 125 Ind. App. 658, 129 N.E.2d 374 (1955); Arnold v. Arnold, 95 Ind. App. 553, 183 N.E. 910 (1933). For an excellent examination of the rule, see Judge Staton's dissenting opinion in *Alderson,* 274 N.E.2d at 711.

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> The overwhelming weight of authority is to the effect that an appellant having recognized the validity of a judgment and decree of divorce . . . by accepting the favorable and/or beneficial provisions thereof, financial and/or marital, accruing to him thereunder, in the absence of fraud, is estopped from questioning the validity of such judgment or decree from and after the acceptance of such benefit or benefits. From and after such acceptance, an appellant is prohibited from proceeding to perfect or maintain any appeal from the same.

233 N.E.2d at 672.

[20]281 N.E.2d 82 (Ind. 1972).

[21]*Id.* at 83.

[22]*See* 274 N.E.2d at 711 (Staton, J., dissenting).

[23]253 Ind. 295, 253 N.E.2d 250 (1969).

lant had remarried in *Sidebottom,* whereas in *O'Connor* the only act of acceptance was the sale of an automobile.[24] The *O'Connor* court thus distinguished between acceptance of a *marital* benefit and the acceptance of a *financial* benefit.

The *Alderson* court, however, viewed a *summary* application of the doctrine, even in its more restricted form, as producing results which ill-serve the needs of our society. The court expressed its concurrence with Judge Staton's dissenting opinion in *Alderson v. Alderson,* in which he stated that the rule worked to penalize a party for remarrying and thus senselessly forced a postponement of a restoration to normal and productive living.[25]

The court concluded that the doctrine's result could no longer be justified, and therefore it overruled *Sidebottom* and held that the summary application of the doctrine of estoppel when the appellant has remarried pending appeal, even though the appellant raised no question on appeal concerning the validity of the marital dissolution, is no longer the law in Indiana.[26] Thus, the court struck down the long-standing doctrine of indivisibility, a rule

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[24]In *O'Connor* the court stated:

> It is true that the acceptance of financial benefits accruing to a spouse from the granting of a divorce *may* in some cases estop that spouse from the prosecution of an appeal. However, there are obvious limitations to this theory where the acceptance of certain financial benefits is the *only* evidence available to support the proposition that a spouse has unqualifiedly accepted the benefits of the decree and hence is precluded from appeal. . . . To require a spouse to incur *liabilities or losses* in order to be free of an allegation of accepting the benefits of a divorce decree is an anomaly indeed. Likewise, a requirement that possession of all assets, regardless of their nature, be frozen in the spouse to which they are awarded if an appeal is contemplated is unreasonable, unrealistic and unnecessary.

Id. at 298-99, 253 N.E.2d at 251-52 (citations omitted).

[25]Judge Staton, in his dissenting opinion in *Alderson,* said:

> Divorce is not an uncommon or infrequent occurrence in our society today. If a party is penalized for remarrying while his or her appeal is pending on matters other than the validity of their marital status, a restoration to normal and productive living is senselessly postponed. The order and tranquillity of our society is ill served by insisting on a semistatic marital relationship during a long drawn out appeal.

274 N.E.2d at 712.

[26]The court also noted that the doctrine was in direct conflict with Indiana Rule of Trial Procedure 59(G), which provides that only those errors raised in a motion to correct errors can be considered on appeal.

which was based not on reason, but upon arbitrary and questionable authority.

2. Statutory Developments

The following discussion is a comparison of Indiana's prior divorce law[27] and the new dissolution statute,[28] with special emphasis upon the procedural requirements under the Dissolution of Marriage Act, effective September 1, 1973. The act may be divided into the three areas of dissolution procedures, property settlement, child support, and separation agreements.[29]

A dissolution proceeding[30] is commenced by filing a petition entitled, "In the Marriage of ———— and ————." The petition must set out the place and duration of residence of each party, the date of marriage, the date of separation, the names, ages, and addresses of all living children,[31] the grounds for dissolution, and the relief sought.[32] One of the parties must have been a resident of the state for six months and of the county in which the petition is filed for three months immediately preceding the filing.[33] The petition may be filed by one or both of the parties.[34] Only in the former instance must a copy of the petition and summons be served upon the other.

The most significant aspect of the new statute is that it expressly abolishes the existing grounds for absolute and limited divorce.[35] The act provides that dissolution of marriage shall be

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[27]The following laws were specifically repealed: IND. CODE §§ 31-1-14, -17 to -22; 31-2-1, -3, -4; 35-2-1-2 (1971).

[28]Ind. Pub. L. No. 297 (April 12, 1973).

[29]*Id.* § 1.

[30]*Id.* The new no-fault act has repealed IND. CODE § 31-1-22-1 (1971), which provided an action for separation from bed and board on the grounds of adultery, desertion, habitual cruelty, habitual drunkenness, and gross and wanton neglect.

[31]The petition must also indicate whether or not the wife is pregnant.

[32]Ind. Pub. L. No. 297, § 4 (April 12, 1973).

[33]*Id.* § 6. Under prior law, the residency requirements were one year in the state and six months in the county. Ch. 241, § 1, [1933] Ind. Acts 1097.

[34]Ind. Pub. L. No. 297, § 5 (April 12, 1973). Under prior law, the petition was actually a complaint filed by the innocent party. Ch. 43, § 7, [1873] Ind. Acts 107.

[35]Ind. Pub. L. No. 297, §§ 1, 3 (April 12, 1973). The former grounds for divorce were: adultery, impotency existing at the time of marriage, abandon-

decreed only upon a finding of one of the following grounds: (1) irretrievable breakdown, (2) the conviction of either party, subsequent to the marriage, of an infamous crime, (3) impotency, existing at the time of the marriage, (4) incurable insanity of either party for a period of at least two years.[36] Of all these grounds "irretrievable breakdown" is least definitive as to what type of proof will be required to sufficiently establish grounds for divorce. This problem can only be resolved by judicial decision. Under the previous law a divorce was an action by one spouse against the other, and the court, before granting a divorce, found one spouse at fault. However, under the no-fault statute it is the marriage which is at issue, not the conduct of the parties. The relative guilt of each spouse is no longer the primary determination of the court.

In an action for dissolution, the final hearing can be held no earlier than sixty days after the filing of the petition.[37] However, pending the final hearing either party may seek provisional relief by means of a motion for temporary maintenance, accompanied by an affidavit setting forth the factual basis for the motion and the relief sought.[38] If the motion is granted, the movant obtains temporary support or custody of a child of the marriage or possession of property. At the final hearing, upon presentation of all the evidence, if the court finds that the material allegations of the petition are true, it may enter a dissolution decree. However, if the court finds that there is a reasonable possibility of reconciliation, it may continue the matter and order the parties to seek reconciliation through any available counseling. Within forty-five days after the continuance either party may move for dissolution, and the court must enter a dissolution decree. If no motion for dissolution is filed within ninety days after the date of continuance, the matter may be dismissed automatically.[39] The decree is final when entered, subject to the

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ment for two years, cruel and inhumane treatment of either party by the other, habitual drunkenness of either party, the husband's failure to make reasonable provision for his family for a period of two years, the conviction, subsequent to the marriage, in any country of either party of an infamous crime, and incurable insanity for a period of at least five years prior to the action for divorce. Ch. 43, § 8, [1873] Ind. Acts 107; ch. 87, § 1, [1935] Ind. Acts 248.

[36]Ind. Pub. L. No. 297, § 3 (April 12, 1973).

[37]*Id.* § 8.

[38]*Id.* § 7.

[39]*Id.* § 8.

right of appeal. An appeal from the decree which does not challenge the findings as to the marriage will not delay the finalty of the dissolution, so the parties may remarry pending appeal.[40]

The new statute is consistent with prior law in that there are no provisions for alimony. While the prior law referred to alimony, it is clear from the decisions that it provided for only a property settlement.[41] The new law provides that the court shall make no provision for maintenance (alimony) except when it finds a spouse to be mentally and physically incapacitated to the extent that the ability of the spouse to be self-supporting is materially affected.[42]

Under this act, the court will divide the property in a just and reasonable manner. The statute provides that the court may divide the property among the parties, award it to one and require that that party pay the other, or order the property sold and the profits divided. The court in determining what is "just and reasonable" is to consider the contribution of each spouse to the net worth of the marital property, premarital acquisitions or acquisitions by gift or inheritance, the economic circumstances of the spouses at the time the disposition of the property is to become effective, the conduct of the parties during the marriage as related to the disposition or dissipation of their property, and the earning capacity of each party.[43] No property order may be revoked or modified, except when fraud is asserted within two years from the date of the order.[44]

An action for child support is the second action recognized by the no-fault act. This proceeding is commenced by filing a petition entitled, "In re the Support of ————." The petition may be filed by anyone entitled to receive child support pay-

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[40]*Id.* § 9.

[41]IND. CODE § 31-1-12-17 (1971) uses the term alimony. Case law, however, has held that alimony in Indiana is not in the nature of support in the future for the wife. Smith v. Smith, 131 Ind. App. 38, 169 N.E.2d 130 (1960). Alimony is awarded in Indiana for the purpose of making a present and complete settlement of the property rights of the parties and does not include future support for the wife. Sidebottom v. Sidebottom, 140 Ind. App. 657, 225 N.E.2d 772 (1967). *See also* McDaniel v. McDaniel, 245 Ind. 551, 201 N.E.2d 215 (1964). *See generally* Note, *Indiana's Alimony Confusion*, 45 IND. L.J. 595 (1970).

[42]Ind. Pub. L. No. 297, § 9 (April 12, 1973).

[43]*Id.* § 11.

[44]*Id.* § 17.

ments.[45] The only residency requirement is that one of the parties involved be a resident of the state and county at the time of filing the petition.[46] The petition must state the relationships of the parties, the present residence of each party, the names and addresses of any living children of the marriage, and the relief sought.[47]

In an action for dissolution or child support the court may order either parent to pay any amount reasonable for the support of the child, without regard to marital misconduct. The court will consider the financial resources of the parents, the standard of living which the child would have enjoyed had the marriage not been dissolved, the physical or mental condition of the child, and the educational needs of the child.[48] This statute differs significantly from the prior child support statute in that it abolishes the consideration of marital misconduct and provides that either parent may be ordered to pay child support. Under the prior law only the father could be required to pay child support.[49] However, much like the prior statute, the new statute allows expenses for college education to be included in support payments.[50] The act also provides that necessary medical, hospital, or dental expenses be included in the support order. The duty to support a child ceases when the child becomes emancipated; however, the court may order educational support to continue until the child reaches the age of twenty-one. Of course, if the child is incapacitated the court may order that support continue indefinitely.

Any provision of a support order may be modified or revoked. Modification will only be made upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. Also, unless otherwise agreed in writing, when the

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[45] *Id.* § 4.

[46] *Id.* § 6.

[47] *Id.* § 4.

[48] *Id.* § 12.

[49] IND. CODE § 31-1-12-15 (1971). The idea that the father is responsible for support is based on the common law. Requiring the father to do so by statute was merely a confirmation of the common law. Crowe v. Crowe, 247 Ind. 51, 211 N.E.2d 164 (1965).

[50] Ind. Pub. L. No. 297, § 12 (April 12, 1973). For decisions under prior law, see Lipner v. Lipner, 267 N.E.2d 393 (Ind. 1971); Dorman v. Dorman, 251 Ind. 219, 241 N.E.2d 50 (1968); Chaleff v. Chaleff, 144 Ind. App. 438, 246 N.E.2d 768 (1969).

parent obligated to pay support dies, the support order may be modified or revoked upon petition of representatives of the estate.[51]

A child custody proceeding may be commenced in the court by a parent or other person by filing a petition (similar to the child support petition) seeking a determination of custody of the child.[52] The court will determine custody in accordance with the best interests of the child. In determining the best interests of the child, the court will consider the age and sex of the child, the wishes of the child's parents, the wishes of the child, the child's adjustment to his home, school and community, and the mental and physical health of all individuals involved.[53] There is no presumption favoring either parent. The party awarded custody may determine the child's upbringing, unless upon motion by a non-custodial parent, the court finds that the child's physical health or emotional development would be significantly impaired.

The court in reaching its final determination may interview the child in chambers and may permit counsel to be present at the interview.[54] Also the court may order an investigation concerning the custodial arrangements for the child to be made by the court social service agency, the staff of the juvenile court, the local probation or welfare department, or a private agency employed by the court for that purpose.[55] The statute clears up many of the evidentiary problems which have surrounded these investigative reports, such as the admissibility of these reports in evidence, counsels' right to examine these reports, and the parties' right to know the identity of the people consulted.[56] Under the no-fault statute the court must mail the report to counsel and to any party not represented by counsel at least ten days prior to the hearing. The investigator's file of underlying data, reports, and the names and addresses of all persons whom he has consulted is also available. If these requirements are met, the report is admissible at the hearing and may not be excluded on grounds that it is hearsay or otherwise incompetent.[57]

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[51]Ind. Pub. L. No. 297, § 17 (April 12, 1973).

[52]*Id.* § 20.

[53]*Id.* § 21.

[54]*Id.*

[55]*Id.* § 22.

[56]*See* Watkins v. Watkins, 221 Ind. 293, 47 N.E.2d 606 (1943); Tumbleson v. Tumbleson, 117 Ind. App. 455, 73 N.E.2d 59 (1947).

[57]Ind. Pub. L. No. 297, § 22 (April 12, 1973).

Finally, the noncustodial parent is entitled to reasonable visitation rights unless such would be harmful to the child's well-being. Any visitation order may be modified.[58]

To promote the amicable settlements of marital disputes the statute permits agreements between the parties providing for maintenance, the disposition of property, and the custody and support of children.[59] As in the prior statute, separation agreements are favored.[60] The terms of the agreement, if approved by the court, shall be incorporated and merged into the decree. A property settlement agreement so incorporated is not subject to modification unless the agreement so provides or both parties consent.

C. Interspousal Immunity

In 1964, Patricia Brooks filed a personal injury action against Gene Robinson for injuries arising out of an automobile accident.[61] Five years later, while the action was pending, Brooks and Robinson were married. Robinson filed a motion for summary judgment which the trial court, holding that the doctrine of interspousal immunity barred Brooks' action, sustained. On appeal, the Indiana Appellate Court[62] concluded that the doctrine of interspousal immunity was the law in Indiana and under the doctrine marriage extinguished all rights of action between spouses for injuries to person or character.[63] Therefore, the trial court's decision was affirmed. In an opinion by Justice Hunter, the Indiana Supreme Court, finding the reasoning upon which the doctrine was founded judicially unsound, abrogated the common law doctrine of interspousal immunity.[64]

The common-law doctrine was based upon the theory that, legally, the husband and wife were one person, and that person

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[58]*Id.* § 23.

[59]*Id.* § 10.

[60]*See* ch. 120, § 2, [1949] Ind. Acts 310. *See also In re* Webb, 160 F. Supp. 544 (S.D. Ind. 1958).

[61]Brooks was a guest passenger and, therefore, the complaint alleged wanton and wilful misconduct on the part of Robinson, the operator of the vehicle.

[62]That court is now the Indiana Court of Appeals.

[63]Brooks v. Robinson, 270 N.E.2d 338 (Ind. Ct. App. 1971), *rev'd,* 284 N.E.2d 794 (Ind. 1972).

[64]Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972), *noted in* 6 IND. L. REV. 558 (1973).

was the husband.[65] The wife had no separate personal or property rights, for her legal existence merged with that of her husband upon marriage.[66] The result of this legal fiction was that all actions between spouses were barred.[67] The doctrine was first applied in Indiana[68] in the early case of *Barnett v. Harshbarger*,[69] in which the court applied it to a contract action between spouses. The first case to apply the doctrine to a personal tort action was *Henneger v. Lomas*, decided in 1896.[70] From that time until 1972, the doctrine had been repeatedly recognized as the law in Indiana.[71]

The common-law legal relationship between husband and wife has been modified by statute,[72] and consequently the restrictive effect of the interspousal immunity doctrine has been lessened

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[65]*In re* Estate of Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970); Barnett v. Harshbarger, 105 Ind. 410, 5 N.E. 718 (1886); W. PROSSER, LAW OF TORTS § 122, at 859 (4th ed. 1971); 1 W. BLACKSTONE, COMMENTARIES *422 (1768).

[66]W. PROSSER, LAW OF TORTS § 122, at 859 (4th ed. 1971); 1. W. BLACKSTONE, COMMENTARIES *442 (1768).

[67]No suit could be brought due to an absence of parties to the controversy. McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930). *See, e.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896); W. PROSSER, LAW OF TORTS § 122, at 860 (4th ed. 1971).

[68]As part of the common law, the doctrine of interspousal immunity became Indiana law pursuant to IND. CODE § 1-1-2-1 (1971). Hanna v. Hanna, 143 Ind. App. 490, 241 N.E.2d 376 (1968).

[69]105 Ind. 410, 5 N.E. 718 (1885). The court noted that to disturb such a long-standing policy of the common law would, because of the theory behind the doctrine, create dissensions between husband and wife

> . . . by requiring the wife to use the husband during the existence of the marital relation or lose her rights by lapse of time, thus creating discord and strife which it was the purpose of the common law to prevent.

Id. at 415, 5 N.E. at 720.

[70]145 Ind. 287, 44 N.E. 462 (1896). The court there explained the doctrine's theoretical basis:

> [T]he common law rule that marriage extinguished all rights of action in favor of the wife against the husband . . . was founded upon the principle of the unity of husband and wife, and not upon the theory that the wife was under a legal disability.

Id. at 293, 44 N.E. at 464.

[71]*See, e.g.*, Hanna v. Hanna, 143 Ind. App. 490, 241 N.E.2d 376 (1968); Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N.E. 146 (1929).

[72]IND. CODE § 31-1-9-1 (1971).

considerably. Although the Married Women's Act[73] all but destroyed the unity concept underlying the doctrine, the interspousal immunity doctrine remained quite viable, especially in tort actions.[74] Indiana Rule of Trial Procedure 17(D), adopted in 1970, further diminished the unity theory by allowing each spouse to singularly sue or be sued notwithstanding the marital relationship, *except* in tort actions.[75] Indiana case law has also produced a narrowing of the immunity doctrine. As early as 1889, it was held that a married woman could maintain an action against her husband for injuries to her property.[76] The law permits either spouse to enforce an agreement by the other to repay monies borrowed,[77] and the doctrine has been found inapplicable in wrongful death actions.[78] Despite these encroachments and the increasing criticism by both legal writers and courts,[79] the doctrine remained in force in tort actions[80] until the Indiana Supreme Court acted in *Brooks v. Robinson.*[81] The court first traced the historical development of the interspousal immunity doctrine and its attendant criticism, and then considered two arguments frequently advanced in support of the doctrine. The first argument is that tort actions between spouses would tend to disrupt the peace and harmony of the marriage. The court was unimpressed by this argument, in part because of the nontort actions which may be maintained between

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> Married women, without reference to their age, shall be liable for torts committed by them, and an action may be prosecuted against them for torts committed, as if unmarried. Husbands shall not be liable for the contracts or the torts of their wives.

Id. § 31-1-9-4.

[74]*See* Hanna v. Hanna, 143 Ind. App. 490, 241 N.E.2d 376 (1968); Hary v. Arney, 128 Ind. App. 174, 145 N.E.2d 575 (1957).

[75]IND. CODE § 34-5-1-1 (1971).

[76]Crater v. Crater, 118 Ind. 521, 21 N.E. 290 (1889). *Accord,* Atkinson v. Atkinson, 167 F.2d 793 (7th Cir. 1948); Pavy v. Pavy, 121 Ind. App. 194, 98 N.E.2d 224 (1951).

[77]Harrell v. Harrell, 117 Ind. 94, 19 N.E. 621 (1889); Hinton v. Dragoo, 77 Ind. App. 563, 134 N.E. 212 (1922).

[78]*In re* Estate of Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970).

[79]*See, e.g., id.* at 124-25, 263 N.E.2d at 154; Hunter v. Livingston, 125 Ind. App. 422, 428, 123 N.E.2d 912, 915 (1955); W. PROSSER, LAW OF TORTS § 12, at 863 (4th ed. 1971); Note, *Interspousal Immunity in Indiana,* 3 IND. LEGAL F. 297 (1969).

[80]IND. CODE § 34-5-1-1 (1971).

[81]284 N.E.2d 794 (Ind. 1972).

spouses.[82] Furthermore, as stated by Dean Prosser, it is fallacious to assume that there is a state of peace and harmony left to be disturbed after one spouse has become sufficiently outraged to sue the other.[83]

The second theory frequently offered to support interspousal immunity in tort actions is that such actions between spouses will tend to promote fraud, collusion, and trivial litigation, especially when insurance is involved. The theory is that such suits would not constitute a truly adversary proceeding because the likelihood of collusion would be increased by the common interests of the parties. The court was equally unpersuaded by this reasoning since it incorrectly assumes that the judical system is "so ill-fitted to deal with such litigation that the only reasonable alternative to allowing husband-wife tort litigation is to summarily deny all relief to this class of litigants."[84] Noting that the possibility of

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> We find it difficult to understand how an action in tort would disrupt the tranquillity of the marital state to any greater degree than would actions in ejectment, partition, or contract.

Id. at 796.

[83]

> The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

W. PROSSER, LAW OF TORTS § 122, at 863 (4th ed. 1971).

[84]284 N.E.2d at 796-97. The court quoted the following language from a California decision with approval:

> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual. Klein v. Klein, 58 Cal. 2d 692, 696, 26 Cal. Rptr. 102, 105, 376 P.2d 70, 73 (1962).

284 N.E.2d at 797.

fraud and collusion exists in all litigation, the court held that the danger is not so great as to justify the summary denial of judicial relief merely because the litigation is between spouses.[85]

The appellee next contended that if the doctrine of interspousal immunity were to be abrogated, it should have been accomplished by the legislature, and not the courts. The court observed that the doctrine was a creation of common law, and, therefore, was judicially created. Noting that the common law can and must be adapted to keep pace with changes in our society,[86] the court said that it should not hesitate to "alter, amend, or abrogate the common law when society's needs so dictate."[87]

The appellee further argued that the legislature had considered and rejected a proposal to abolish the doctrine of interspousal immunity in tort actions, and that, therefore, the courts are bound to uphold the doctrine. This assertion was based upon the history of the enactment of Indiana Rule of Trial Procedure 17(D) which provides:

> For the purposes of suing or being sued there shall be no distinction between men and women . . . because of marital or parental status; provided, however, that this subsection (D) shall not apply to actions in tort.[88]

When this rule was originally proposed it did not contain the proviso limiting the applicability of the subsection to actions other than actions in tort, and the appellee contended that the amendment should be regarded as indicative of an affirmative legislative intent to retain the doctrine. The court did not agree

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[85]The court noted that the traditional safeguards are also present in this type of case:

> [T]he testimony of both parties will be extremely vulnerable to impeachment at trial on the grounds of bias, interest and prejudice. The trial court's responsibility, indeed, its duty, to properly instruct the jury on the credibility of witnesses and the rules governing the weight of evidence will remain unchanged . . . .

284 N.E.2d at 797.

[86]*Id., quoting from* Troue v. Marker, 253 Ind. 284, 290, 252 N.E.2d 800, 804 (1969):

> The common law must keep pace with changes in our society, and in our opinion the change in the legal and social status of women in our society forces us to recognize a change in the doctrine with which we are concerned in this opinion.

[87]284 N.E.2d at 797.

[88]IND. CODE § 34-5-1-1 (1971).

and viewed the legislature's action as nothing more than legislative awareness of the doctrine. The court held that the proviso did not purport to abolish tort actions between husband and wife, but rather provided that if any "distinction" between husband and wife existed in tort actions, such distinction was not removed by the rule, but was subject to change by the court.

The court, having found no valid reason for the existence of the doctrine, abrogated the doctrine of interspousal immunity. In doing so, the court followed the spirit of the Indiana Constitution[89] and joined a rapidly growing majority of state courts that have abolished this doctrine which so offends the modern sense of justice and equality.[90]

D. Juveniles

During the current survey period, the question of waiver of jurisdiction in juvenile proceedings arose in an Indiana Supreme Court decision, *Atkins v. State*.[91] The ramifications of this case are as equally applicable to the domestic relations counselor as they are to the criminal lawyer or juvenile judge. On February 27, 1969, Rodman Atkins, age seventeen, was arrested and charged with disorderly conduct arising out of certain peaceful but disruptive demonstrations in front of Shortridge High School.[92] Juvenile proceedings were initiated via a criminal court grand jury indictment. This procedure, however, did not properly vest jurisdiction in juvenile court, and new charges were filed.[93] The prosecutor then filed a petition for waiver of

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[89]IND. CONST. art. 1, § 2 provides:

> All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

[90]Indiana is the twenty-fourth state to abrogate the common-law doctrine.

[91]290 N.E.2d 441 (Ind. 1972).

[92]Atkins and several other students began creating a disturbance and after a warning were arrested pursuant to IND. CODE § 35-27-2-1 (1971).

[93]After the arrest the prosecutor obtained an indictment from the grand jury of the criminal court. Upon receipt of the indictment the criminal court transferred the case to the juvenile court. Atkins challenged the jurisdiction of the juvenile court, and the Indiana Supreme Court in State *ex rel.* Atkins v. Juvenile Court, 252 Ind. 237, 247 N.E.2d 53 (1969), found the jurisdiction improper.

The court held in the first *Atkins* case that the juvenile court has exclusive jurisdiction of children under eighteen and that a prosecutor cannot

jurisdiction and, after a hearing, the petition was granted.[94] Atkins challenged the propriety of the waiver procedure, and the Indiana Supreme Court reversed.[95]

The United States Supreme Court in *Kent v. United States*[96] held that waiver of jurisdiction by a juvenile court is a critical proceeding during which fundamental fairness and due process are required. The Indiana Supreme Court held in *Summers v. State*[97] that the *Kent* requirements were constitutionally mandated[98]

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seek a grand jury indictment against a child *known* to be under eighteen unless a statute confers jurisdiction of the offense in criminal court. *See* IND. CODE §§ 33-12-2-3, 31-5-7-4, -14 (1971). However, if it is not known that the child is under eighteen, then, upon discovery of age, transfer to a juvenile court does vest jurisdiction properly in the juvenile court. *Id.* § 31-5-7-13. For a criticism of this jurisdictional dichotomy, see 252 Ind. at 244, 247 N.E.2d at 56 (Givan, J., dissenting).

If there is no statute vesting exclusive jurisdiction in juvenile court and the district attorney has discretion in determining in which court to proceed, there may be no requirements for a waiver hearing under Kent v. United States, 383 U.S. 541 (1966). *See* People v. Bombacino, 51 Ill. 2d 17, 280 N.E.2d 697 (1972), *cert. denied*, 409 U.S. 912 (1972).

[94]*See* IND. CODE § 31-5-7-14 (1971).

> If a child fifteen (15) years of age or older is charged with an offense which would amount to a crime if committed by an adult, the judge, after full investigation, may waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult. . . .

Id.

[95]Atkins v. State, 290 N.E.2d 441 (Ind. 1972). The decision was three to two, with Justice DeBruler writing for the majority.

[96]383 U.S. 541 (1966). *Kent* held that for a waiver order to be valid there must be a full hearing on the waiver issue, the presence of counsel to represent the child, full access by the child to social records used in the waiver decision, and a statement of reasons accompanying the waiver order.

[97]248 Ind. 551, 230 N.E.2d 320 (1967). *Summers* required the specific rights delineated in *Kent*. *See* note 5 *supra*. In addition, *Summers* discussed the child's right to confront and cross-examine adverse witnesses, to present evidence, and to receive a record. The *Summers* court attached particular importance to the sufficiency of the statement of reasons accompanying the waiver order. Specifically, the statement must be sufficient to demonstrate unequivocally that the statutory requirement of a hearing and full investigation has been met and that a conscientious determination of the waiver question has been made, and must contain sufficient detail to permit meaningful judicial review.

[98]*Summers* followed the majority of jurisdictions in recognizing that *Kent* has constitutional dimensions. *See* Powell v. Hocker, 453 F.2d 652

and that waiver could be effectuated only if the offense had specific prosecutive merit in the opinion of the prosecuting attorney, was heinous or of an aggravated character, or was less serious but part of a repetitive pattern of juvenile offenses which would lead to a determination that the juvenile might be beyond rehabilitation under regular juvenile procedures, or if waiver was in the best interests of the public welfare or security. The *Atkins* decision appears to limit the *Summers* standards with the result that waiver is now more difficult to obtain.

The *Atkins* decision centered upon the specific waiver order. The order contained the statements that the child was over fifteen and under seventeen years of age and was charged with an offense which would be a crime if committed by an adult.[99] The order also stated that the matter had specific prosecutive merit and that there was no disposition available reasonably calculated to effect rehabilitation since Atkins at the time of disposition would be eighteen and not subject to commitment to a state institution.[100] The *Atkins* majority found that the order was not clear enough to permit meaningful review.

The court began its analysis of the order by turning to the statutory presumption that a child is to be handled within the juvenile system and that waiver is an alternative of last resort.[101]

(9th Cir. 1971); United States *ex rel.* Turner v. Rundle, 438 F.2d 839 (3d Cir. 1971); Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970); P.H. v. Alaska, 504 P.2d 837 (Alas. 1972); *In re* Doe, 50 Hawaii 620, 446 P.2d 564 (1968) (by implication); State v. Halverson, 197 N.W.2d 765 (Iowa 1972); Smith v. Commonwealth, 412 S.W.2d 256 (Ky.), *cert. denied*, 389 U.S. 873 (1967); People v. Fields, 199 N.W.2d 217 (Mich. 1972); State *ex rel.* Arbeiter v. Reagan, 427 S.W.2d 371 (Mo. 1968); Kline v. State, 86 Nev. 59, 464 P.2d 460 (1970); *In re* State *ex rel.* H.C., 106 N.J. Super. 583, 256 A.2d 322 (1969); State v. Yoss, 10 Ohio App. 2d 47, 225 N.E.2d 275 (1967); Bouge v. Reed, 459 P.2d 869 (Ore. 1969); Freeman v. Superintendent of State Correctional Inst., 212 Pa. Super. 422, 242 A.2d 903 (1968); State v. Pische, 74 Wash. 2d 9, 442 P.2d 632, *cert. denied*, 393 U.S. 969 (1968); *In re* Winburn, 32 Wis. 2d 152, 145 N.W.2d 178 (1966). *Contra*, Commonwealth v. Roberts, 285 N.E.2d 919 (Mass. 1972); Commonwealth v. Marten, 244 N.E.2d 503 (Mass. 1969).

[99]These are statutory requirements for waiver. IND. CODE § 31-5-7-14 (1971).

[100]These findings are necessary to meet the *Summers* requirements.

[101]IND. CODE § 31-5-7-1 (1971).

> The purpose of this act is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the State; and when such child is removed from his own family, to secure

Thus, waiver is the exception and must be "explicitly justified in the waiver order."[102] With this standard in mind, the court examined the language of the order. The finding that, in the opinion of the prosecutor, the case had specific prosecutive merit was subjected to strict scrutiny. Although the *Summers* court used this language as a guideline for waiver, the *Atkins* court found the language meaningless.[103] Specifically, it was unclear whether the language means that the prosecutor would prosecute, that he could do so successfully, or that waiver was in the best interests of the child. Since the language was not definitive and did not demonstrate the necessity of waiver for the best interests of the child and the state, the statutory presumption was not overcome and the order was not sufficient to justify waiver.[104]

The juvenile court also justified waiver on the grounds that because Atkins would be over eighteen at the time of disposition, he could not be committed to a state institution. Practically, Atkins could have been committed to a number of institutions, although by statute he could not be committed to the boys' school.[105]

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for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

Id.

[102]290 N.E.2d at 443.

[103]In *Summers* the court held:

In this regard, we would say that an offense committed by a juvenile may be waived to a criminal court if the offense has prosecutive merit in the opinion of the prosecuting attorney. . . .

248 Ind. at 561, 230 N.E.2d at 325.

[104]The court stated that the crucial question was whether or not jurisdiction *should* be waived. Ultimately this is a finding to be made by the juvenile court. Consequently, the *Summers* guideline of specific prosecutive merit *in the opinion of the prosecutor* can never be sufficient for waiver. 290 N.E.2d at 443.

The *Atkins* analysis leaves in doubt the *Summers* holding that the prosecutor may file a waiver petition if, in his opinion, the case has specific prosecutive merit. Since specific prosecutive merit is now a phrase of unknown meaning it is questionable as to what circumstances will permit a prosecutor to file a petition. Although the *Atkins* court is correct in labeling the phrase fatally ambiguous, it does not correct that ambiguity.

[105]IND. CODE § 11-3-2-3 (1971) precludes commitment of a child over eighteen to the boys' school. However, pursuant to *id.* § 31-5-7-15, the juvenile court still has the option to commit the children to "any suitable public institution or agency, which shall include, but is not limited to, the state institutions for feeble-minded, epileptic, or insane."

Therefore, the question facing the supreme court was why the unavailability of commitment to boys' schools required the juvenile court to waive jurisdiction. Noting the absence of any explanatory statements, the court held this section of the waiver order too ambiguous to permit meaningful review.[106]

The court went another step and examined possible assumptions which might have been the basis of the waiver order. One assumption could have been that all the juvenile dispositions were meaningless absent the ultimate sanction of commitment to the boys' school. Also the juvenile court may have decided that commitment was the only proper disposition and, absent commitment, waiver was the only alternative. The court analyzed both of these possible assumptions and concluded that upon the facts both were unjustified. The determinative facts were that Atkins had been in no previous trouble; he and his parents voluntarily cooperated with the juvenile court; and he was duly enrolled and attending high school.[107] Consequently, the court concluded that there was no evidence that the less severe dispositions available to the juvenile court would be inadequate.[108] Thus, waiver upon these facts was error.

In a strong dissent, Justice Arterburn criticized the majority for severely limiting the trial judge's discretion.[109] After indicating that the waiver order technically conformed to *Summers*,[110] the dissent contended that now the juvenile court must

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> Review should not be remitted to assumptions. In order to engage in a meaningful review this court must have a statement of the juvenile court's reasons, which motivated the waiver, including of course, a statement of the relevant facts. We may not assume there are adequate reasons . . . .

248 Ind. at 551, 230 N.E.2d at 324.

[107]Two appellants with Atkins had been in previous trouble, and their cases were remanded for a redetermination of the waiver issue. 290 N.E.2d at 445.

[108]Dispositions less severe than commitment include ordering probation or wardship, taking the case under advisement and postponing judgment, and making further disposition in the best interests of the child. IND. CODE § 31-5-7-15 (1971).

[109]290 N.E.2d at 448.

[110]It is apparent that the order did technically conform to *Summers*. But, as *Summers* held that a mere recitation of the statute is not sufficient to justify waiver, *Atkins* held that mere recitation of the *Summers* criteria is not enough to justify the waiver.

show that there are no juvenile dispositions available before waiver can be effectuated. In one light the dissent's interpretation of the majority is correct. Because the majority did not stop at finding the order insufficient to permit meaningful review, but also indicated that even if it had been sufficient, there was still error, the majority has, in effect, promulgated a principle that the waiver order must explicitly justify waiver as the only alternative open to the juvenile court. If under any set of facts in the record it appears that a juvenile is amenable to a juvenile disposition, then waiver will be improper. This reasoning goes considerably beyond the standards expressed in *Summers*.

The majority opinion probably severely restricts the situations in which waiver will be allowed. Nonetheless, one can read it to mean that waiver cannot be based on any recitation of predefined standards or criteria and that for a waiver to be valid the juvenile court must merely state clear reasons for waiver on the facts of the case. This less restrictive application, however, seems unlikely when one considers the presumption in favor of caring for a child within the juvenile system if that system provides any conceivable remedy.

E. Paternity and Legitimation

Lord Mansfield's rule of the presumption of legitimacy[111] was logically shaken in a recent Indiana Court of Appeals decision.[112] In an action brought by a second husband, seeking to be declared the father of his wife's child born during her previous marriage, the trial court awarded summary judgment to the first husband. The appellate court reversed.

The facts giving rise to this declaratory judgment action are not uncommon. Women often conceive during an adulterous relationship, and some of them marry the biological father after a divorce.[113] The threshold question in this suit was whether or

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[111]This common law rule forbids either spouse from offering evidence that the child born or conceived during wedlock is not the natural child of the husband. The rule has sustained surprising vitality largely through the application of stare decisis and the underlying feeling of courts that bastards are disfavored by the law. Legislatures have consistently reiterated the same moral judgments. *See* IND. CODE § 29-1-2-7(b) (1971).

[112]A.B. v. C.D., 277 N.E.2d 599 (Ind. Ct. App. 1972).

[113]*In re* Stroope's Adoption, 232 Cal. App. 2d 581, 43 Cal. Rptr. 40 (1965); Serway v. Galentine, 75 Cal. App. 2d 86, 170 P.2d 32 (1946); Melis v. Department of Health, 260 App. Div. 772, 24 N.Y.S.2d 51 (1951); *cf.*, Commonwealth v. Helton, 411 S.W.2d 932 (Ky. 1967).

not public policy would sanction a law suit which would in effect make a previously legitimate child illegitimate.[114] After acknowledging that other jurisdictions may well have modified their substantive law to conform with natural law, the court rejected the applicability of those decisions to Indiana.[115] The court first decided that there was no legal basis for making the child in question the legitimate child of the plaintiff.[116]

This disposition of the initial issue left the question of whether or not the plaintiff might have sufficient interest in being named the biological father of the child to grant him the standing to sue. At common law the father of an illegitimate had absolutely no rights with regard to the child.[117] This was also the law of Indiana until 1954 when the Probate Code[118] was enacted.[119] Under the Probate Code once paternity has been established, the father of an illegitimate becomes an heir apparent to the child.[120] Obviously the interest of an heir apparent cannot vest until death and that expectancy has no pecuniary value during the lifetime of the child. Nevertheless, the court held that even this mere expectancy

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[114]Since 1954 Indiana has had no provision for legitimating bastards. The Probate Code, IND. CODE §§ 29-1-1-1 to -20-1 (1971), provides for limited legitimation for purposes of inheritance and for purposes of descent but does not purport to affect the status of an illegitimate child. Prior to 1954, the illegitimate child could be legitimated for all purposes by a subsequent marriage of the mother and acknowledgment by the husband that the child was his own. This civil law rule was expressly repealed when the Probate Code became effective. *Id.* § 29-1-19-18. The new provision has been judicially construed not to be a legitimation statute. Thacker v. Butler, 134 Ind. App. 376, 184 N.E.2d 894 (1962).

[115]The court made it clear that for it to yield to the well-reasoned law outside Indiana, a new legislative enactment would be required:

> . . . If we assume, as well may be the case, that the 1953 Legislature did not really intend to discard the more lenient civil rule of legitimation and return to the harsher common law rule of non-legitimation, we must bear in mind that such legislative oversights can rarely be rectified by any human agency save the legislature itself.

277 N.E.2d at 606.

[116]Witt v. Schultz, 139 Ind. 142, 217 N.E.2d 163 (1966).

[117]At common law the bastard was *nullius filius*—the child of no one—and as such had no existence with respect to his father.

[118]IND. CODE §§ 29-1-1-1 to -20-1 (1971).

[119]L.T. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N.E. 411 (1911).

[120]IND. CODE § 29-1-2-7 (1971).

was sufficient to raise standing for the illegitimate father to bring a paternity action. In addition the putative father was an interested party who can qualify under the Declaratory Judgment Act.[121]

The trial court ruled that this challenge to the status of a legitimate child was contrary to the policy of Indiana since it allowed an attack upon the presumption of legitimacy. The defendant contended that the plaintiff was estopped to challenge the paternity of the child because the divorce decree declared that the child was issue born of the marriage and the plaintiff had accepted the decree as valid as evidenced by his subsequent marriage to the child's mother. The court of appeals answered that, even had this tenuous argument been accepted, the child would not be affected by a judgment set up between the plaintiff and defendant when the child was not a party to the proceedings.[122] As for the policy argument, the court could find no logical reason for Indiana to regard "illegitimacy" as it was regarded at common law.[123]

At trial both defendant and plaintiff moved for summary judgment. Plaintiff's motion was supported by affidavits showing that blood tests confirmed that defendant could not be the child's father. A blood grouping test to which the child, the mother and the parties submitted showed that plaintiff was in the class of persons who could have been the father. The mother swore by affidavit that plaintiff was the only man with whom she had had sexual intercourse during the time of conception. She also alleged by affidavit that her former husband was impotent. Defendant's response rested entirely on policy grounds, *i.e.*, the presumption of legitimacy. The court of appeals took the view that the granting of summary judgment should not be used to establish paternity or nonpaternity "especially when the judgment would have the effect of rendering a previously legitimate child illegitimate."[124]

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[121] *Id.* §§ 34-4-10-1 to -16.

[122] *See* State *ex rel.* Evertson v. Cornett, 391 P.2d 277 (Okla. 1964).

[123] Nevertheless, the court refused to definitively state that no such policy existed but chose instead to rest its decision on plaintiff's standing to sue. It cannot be denied that the child's interest in retaining the status of a legitimate may outweigh his heirship expectancy from an illegitimate father. On the other hand, when the illegitimate father has a considerable estate, it may be to the child's pecuniary interest to be declared an illegitimate. The court made it clear that the presumption of legitimacy can be overcome only in an action to which the child is a party.

[124] 277 N.E.2d at 619.

VIII. EVIDENCE*

The Indiana courts decided numerous cases covering many points of evidence; however, no attempt will be made here to cover them all. Rather, the purpose of this section is to note new developments, clarifications and reaffirmations in evidence law.

A. Demonstrative Evidence

1. Exhibits in the Jury Room

In one of the more important cases, *Thomas v. State*,[1] the trial court allowed the jury to take exhibits into the jury room over the defendant's objection.[2] The exhibits consisted of statements of a State's witness which had been admitted for impeachment purposes. The Indiana Supreme Court held this to be prejudicial error and in so doing adopted the American Bar Association's standards for jury use of exhibits. While the trial court still has discretion on the matter, Indiana has now adopted the following guidelines to aid in the exercising of that discretion. The court may permit the jury to take a copy of the charges against the defendant and exhibits and writings which have been received in evidence (except depositions).[3] Among the considerations to be used in the exercising of this discretion are i) whether the material will aid

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*Thomas A. Cicarella, Robert G. Neely, Gregory J. Utken.

[1]289 N.E.2d 508 (Ind. 1972).

[2]The few cases on the subject indicate it would be error to permit such statements to be taken to the jury room during deliberations. Toohy v. Sarvis, 78 Ind. 474 (1881); Nichols v. State, 65 Ind. 512 (1879); Lotz v. Briggs, 50 Ind. 346 (1875); Eden v. Lingenfelter, 39 Ind. 19 (1872); Cheek v. State, 35 Ind. 492 (1871); Smith v. West, 30 Ind. 367 (1868). These cases led to the statement:

> It is settled law in this state that it is error to permit, over the objections of the opposite party, items of documentary evidence to be taken to their consultation room by the jury . . . .

1 L. EWBANKS, INDIANA CRIMINAL LAW § 497, at 319 (Symmes ed. 1956).

In most jurisdictions depositions are not permitted in the jury room. *See* 5 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 723, at 712 (1963). The reason for this is that to allow a deposition or other similar document to go to the jury room allows the jury to examine it and give it a greater emphasis or subject it to closer criticism than other evidence. *Id.* § 723, at 713; 1 L. EWBANKS, *supra* § 497, at 319; *accord*, MODEL CODE OF EVIDENCE rule 105(m), Comment (1942). *See generally* C. MCCORMICK, LAW OF EVIDENCE § 217, at 539 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[3]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY § 5.1 (Approved Draft 1968).

the jury in a proper consideration of the case, ii) whether any party will be unduly prejudiced by submission of the material, and iii) whether the material may be subject to improper use by the jury.[4] The court in *Thomas* held that since the witness' statements were similar to a deposition it was improper to permit them to go to the jury as it violated all three considerations.[5] Chief Justice Arterburn, dissenting, stated that the fear that one part of the evidence may be overly emphasized is counterbalanced by the fact that the memory of the jury may not be sufficient to retain details as to the exhibits.[6]

In the case of *Martin v. State*[7] the defendant, charged with murder, argued that it was improper for the trial court to refuse to let the jury take the court's instructions with them to the jury room. The supreme court observed that established Indiana law was to the contrary, but that persuasive arguments existed on both sides. However, if the law in Indiana was to be changed, it should be done either by legislative enactment or by rule of the court. Hence, the trial court's action was not reversible error.[8]

2. *Admissibility of Gruesome Photographs*

A trio of cases reaffirmed Indiana's liberal policy of admitting photographic evidence when the exhibits are gruesome. In *Dudley Sports Co. v. Schmitt*[9] the plaintiff had been hit in the face by a defective pitching machine. During the trial, over objection as in-

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[4] *Id.*

[5] 289 N.E.2d at 509. The statements would be of little aid to the jury since they were not submitted for the truth of the matter contained therein. Also, they were subject to improper use in two ways: the jury might consider them for their truth and might give them undue weight.

[6] *Id.* at 510. Chief Justice Arterburn queried—why should the jury be required to rely upon memory which can be erroneous and corrected by actual facts. *But see* 1 L. EWBANKS, *supra* note 2:

> The juror is to register the evidence as it is given on the tablets of his memory and not otherwise.

Id. § 497, at 319.

[7] 296 N.E.2d 793 (Ind. 1973).

[8]

> It is certainly not the type of question of such vital import that a case otherwise properly tried should be reversed for the sole purpose of sending written instructions to a jury room.

Id. at 797.

[9] 279 N.E.2d 266 (Ind. Ct. App. 1972).

flammatory, the plaintiff offered color photographs of his face while on the operating table. The injuries consisted of deep cuts and lacerations on his upper lip, nose, and forehead, a partially severed nose, a crushed left sinus cavity, an exposed skull bone, and two chipped teeth. The court of appeals held the photographs to be relevant and admissible though repulsive and gruesome.[10]

Similarly, in *Blevins v. State*[11] it was held not to be error to admit photographs of the deceased's body on an autopsy table with a probe protruding from a bullet wound in the head. It was relevant in that it showed the angle at which the bullet entered.[12] Likewise, in *Ray v. State*[13] photographs of a dead body and wounds were held admissible.

In each case the courts applied the general rule that a photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence to visually display that which a witness may verbally describe.[14] Under this tolerant rule the courts will look at the exhibits to see the purpose for which they are offered. If they could only serve to inflame the jury or excite their feelings, rather than enlighten them as to any facts in issue, they will be excluded. Conversely, if they are in any way relevant, they will be admitted regardless of their gruesome or inflammatory nature. An extension of this rule to its current limits is questionable and a balancing of interests seems more equitable. Is it always necessary to sacrifice inflammatory prejudicial effect for relevant evidence, especially when the evidence is merely cumulative? It seems more realistic to acknowledge the fact that after the admission of a doctor's testimony and/or hospital records, the attorney's purpose in offering a photograph that is gruesome, but does corroborate his case, is to excite or upset the jury and receive larger damages. While this decision puts Indiana in line with a majority of jurisdictions, the rule may be clarified or narrowed in future cases.[15]

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[10]*Id.* at 277.

[11]291 N.E.2d 84 (Ind. 1973).

[12]Brown v. State, 252 Ind. 161, 247 N.E.2d 76 (1969), held that photographs of probes in a wound were acceptable to show the angle at which the bullet entered.

[13]291 N.E.2d 562 (Ind. Ct. App. 1973).

[14]Wahl v. State, 229 Ind. 521, 98 N.E.2d 671 (1951); Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941); Midwest Oil Co. v. Storey, 134 Ind. App. 137, 178 N.E.2d 468 (1961).

[15]Examples of gruesome photographs admitted under this rule include: Schmidt v. State, 255 Ind. 443, 265 N.E.2d 219 (1970) (photograph of

3. Handwriting

In *Duncan v. Binford*[16] the court of appeals discussed the rules on authentication. A summons was delivered and a receipt signed, but the defendant claimed that it was not his signature on the receipt. The plaintiff, over objection, testified that the signature, in her opinion, was the defendant's. Defendant's objection was that plaintiff had not testified based on a comparison of handwriting samples. The court noted the familiar rule that a witness who is an expert must speak from his knowledge based on having seen the party write or from authentic papers derived in the course of business or from mere comparison.[17] But in *Duncan* the court noted that the witness was only asked to testify based upon her familiarity with the defendant's signature. Her opinion was based on her actual observation of defendant's signature and went only to the weight of the evidence.[18]

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decedent's torso and severed limbs); Brown v. State, 252 Ind. 161, 247 N.E.2d 76 (1969) (photographs of probes in wound); Wilson v. State, 247 Ind. 680, 221 N.E.2d 347 (1966) (photograph of murder victim in pool of blood); Wahl v. State, 229 Ind. 521, 98 N.E.2d 671 (1951) (photographs of deceased and her brain). *But see* Kiefer v. State, 239 Ind. 103, 153 N.E.2d 899 (1958) (admission of gruesome and shocking photos showing hands and instruments of surgeon inside chest of deceased during autopsy and additional incisions and stitches by surgeon performing the autopsy held reversible error); Evansville School Corp. v. Price, 138 Ind. App. 268, 208 N.E.2d 689 (1965) (admission of photo depicting deceased youth lying in casket held error).

Under the present law the material issue in cases involving the admission of revolting or gruesome photographs is whether or not they are relevant to the issues involved, not whether or not they are gruesome. 247 Ind. at 684, 221 N.E.2d at 349. This may be an unnecessarily harsh rule.

Dicta in *Kiefer, supra,* may indicate that the application of this rule has limits. The court stated that when necessary to prove a contested relevant fact, the probative value of such pictures is held to outweigh any possible prejudicial effect they might have. This would indicate that when the photographs are not necessary to prove the fact but are used as cumulative evidence, the probative value may not outweigh the prejudicial effect. This may provide a method of attacking inflammatory photographs. *See generally* 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1231 (2d ed. 1969).

[16]278 N.E.2d 591 (Ind. Ct. App. 1972).

[17]*Id.* at 599. *See also* Forgey v. National Bank, 66 Ind. 123 (1879); Chance v. Indianapolis & Westfield Gravel Road Co., 32 Ind. 472 (1870).

[18]The testimony was,

> Q. Do you have an opinion based on your familiarity with Mr. Duncan's signature as to whether or not the signature that appears on Defendant's Exhibit A is or is not his signature?
>
> . . .

This rule was stated more succinctly in *Smith v. State,*[19] a forged instrument case. The court of appeals there stated that when the genuineness of a signature appearing on a document is in issue, a lay witness is deemed qualified to render an opinion as to authenticity if he is acquainted or familiar with the signature of the person whose signature he is called upon to identify.[20]

While the rules stated in these cases are the accepted standards for authenticity,[21] it may be questioned whether or not stricter rules should be applied when the signature is in fact an issue, as it was in these cases. In such cases perhaps a more scientific approach should be taken by the use of handwriting experts.[22] As one authority states that if a writing is questioned, "no person not trained in the science and art of document examination is truly competent to distinguish a skilled forgery from a genuine writing."[23]

4. Failure to Introduce Objects Taken in Theft Cases

The case of *Shropshire v. State*[24] clarified the Indiana rule regarding the introduction into evidence of goods taken in a theft. In *Shropshire,* the defendant was convicted for stealing a tape

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A. I believe it's his signature.

278 N.E.2d at 599.

[19]284 N.E.2d 522 (Ind. Ct. App. 1972). *See also* Morell v. Morell, 157 Ind. 179, 60 N.E. 1092 (1901).

[20]284 N.E.2d at 525.

[21]This is the majority rule. The minimal standards demanded of the lay witness who authenticates a writing by identification of the handwriting find their justification on the basis that no more than one in one hundred writings is questioned. These permissive standards allow the admission of the general run of authentic documents with a minimum of time, trouble and expense. McCormick § 221. Professor McCormick suggests that maximum savings of these commodities could be achieved by presuming the authenticity for purposes of admissibility in the absence of proof raising a question as to genuineness. *Id.*

[22]

> Certainly it is incredible that an unskilled layman who saw the person write once a decade before could make such a differentiation. In the event of an actual controversy over genuineness both logic and good advocacy demand a more scientific approach and resolution of the issue mainly upon the testimony of bona fide handwriting experts.

Id.

[23]*Id.* § 221, at 548.

[24]279 N.E.2d 219 (Ind. 1972).

recorder and a bayonet. The objects were recovered but not offered into evidence. On appeal the defendant contended that there was insufficient evidence to sustain the verdict because the stolen goods were not offered into evidence. Appellant relied on the case of *Keiton v. State*[25] in which the supreme court had stated that in all future cases, unless there was good reason, because of size, weight or unavailability, for not introducing such evidence as part of the case in chief to prove the *corpus delecti*, then the failure of the State to introduce such evidence as an exhibit would be sufficient reason to require the trial court, on the defendant's motion, to strike all evidence relative thereto from the record.[26] The *Shropshire* court held the *Keiton* rule inapplicable because the appellant failed to move to strike. Thus, it is now clear that mere failure of the State to introduce the stolen goods will not be sufficient to strike the testimony relating thereto. The defendant has the affirmative duty to move for such a strike.

5. *Polygraph Tests*

There has been little, if any, case law in Indiana on polygraph tests, but two cases last term indicate that Indiana is in line with the majority rule. In *Zupp v. State*,[27] during the investigation of a rape case the prosecuting witness submitted to a lie detector test. Defendant filed a motion to require the State to produce the results of the test. The motion was denied. Defendant appealed and the supreme court, finding no error, affirmed. Holding that the results were not discoverable, the court said in dictum that the results of a lie detector test are inadmissible as evidence.[28] In a later case, *Reid v. State*,[29] a robbery defendant petitioned the trial court for an order permitting him to take a polygraph. In the petition he stated a waiver of objections. The trial court admitted the testimony of a polygraph expert as a rebuttal witness for the State. Defendant claimed this to be error. The supreme court held no

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[25]250 Ind. 294, 235 N.E.2d 695 (1968).

[26]*Id.* at 301, 235 N.E.2d at 699.

[27]283 N.E.2d 540 (Ind. 1972). In Carpenter v. State, 251 Ind. 428, 241 N.E.2d 347 (1968), the court refused to pass on the admissibility of polygraph tests, but held that the trial court's consideration of test results without having a technician testify and be subject to cross-examination was prejudicial error.

[28]283 N.E.2d at 543. The court cited no Indiana authority on the matter, nor did the appellant rely on any. Rather, California authority was cited, indicating that no Indiana law on point exists.

[29]285 N.E.2d 279 (Ind. 1972).

error inasmuch as the defendant had petitioned for the test and signed an express waiver of objections, and therefore the results of the test were admissible.[30] Seemingly, the rule in Indiana is that the results of a lie detector test are inadmissible unless the party who was the subject of the test waives objection to its admissibility. However, if the reasoning behind inadmissibility of polygraph examinations is viable, the holding of *Reid* can be challenged. Courts have been reluctant to admit polygraphs because they are unconvinced of their reliability due to the numerous variables involved.[31] If inadmissibility is based upon doubt of any probative value, the fact that a person took the examination and signed a waiver should be of no moment as to admissibility. If the results are of doubtful probative value, they do not gain probative value by a mere waiver. The law in Indiana awaits further clarification on this matter.

6. Proper Foundation for the Admission of a Tape Recording

The most signficant case concerning demonstrative evidence, *Lamar v. State,*[32] created new foundation requirements for the admissibility of tape recordings. Prior law in Indiana was not well defined and held only that sound recordings were admissible upon proper identification and authentication.[33] The defendant was convicted of voluntary manslaughter. At the trial, the jury, over the defendant's objection, was permitted to hear a tape recording of his in-custody interrogation by police officers at the station. Defendant based his objection on improper foundation for admissibility and, relying on a Georgia case, requested that eight requirements be recognized.[34] The Indiana Supreme Court, relying

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[30]*Id.* at 281. *See* Comment, *Lie Detector Tests: Possible Admissibility Upon Stipulation,* 4 JOHN MAR. J. PRAC. & PRO. 244 (1971).

[31]*See generally* MCCORMICK § 207; Levitt, *Scientific Evaluation of the "Lie Detector",* 40 IOWA L. REV. 440 (1955); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection,* 70 YALE L.J. 694 (1961); *Symposium, The Polygraphic Truth Test,* 22 TENN. L. REV. 711 (1953).

[32]282 N.E.2d 795 (Ind. 1972).

[33]Sutton v. State, 237 Ind. 305, 145 N.E.2d 425 (1957).

[34]Solomon v. Edgar, 92 Ga. App. 207, 88 S.E.2d 167 (1955). The requirements set forth in *Solomon* were: i) it must be shown that the mechanical transcription device was capable of taking testimony; ii) it must be shown that the operator of the device was competent to operate it; iii) the authenticity and correctness of the recording must be established; iv) it must be shown that changes, additions or deletions have not been made; v) the manner of preservation of the record must be shown; vi) the

heavily on that case, set up five standards for the admissibility of sound recordings. In the future the admission of sound recordings should be preceded by a foundation disclosing that i) the recording is authentic and correct;[35] ii) the testimony elicited was freely and voluntarily made, without any kind of duress; iii) all required warnings were given and all necessary acknowledgements and waivers were knowingly and intelligently given; iv) the recording does not contain matters otherwise not admissible into evidence;[36] and v) it is of such clarity as to be intelligible and enlightening to the jury. The court stated that improved methods of obtaining and presenting competent evidence should not only be sanctioned but encouraged. In adopting these standards, the court noted that it must not lose sight of fundamental safeguards, but neither must it sacrifice scientific and technological progress to preservation of rules that have outlived their usefulness.[37]

7. Jury Views

The supreme court indicated that it would be amenable to a change in the law on jury views in *Robinson v. State.*[38] After the jury had been selected and sworn, but before the introduction of any evidence, the jury was taken to the scene of the crime. This was done on motion of the State. The defendant's objection to that

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speakers must be identified (the Indiana Supreme Court held this to be desirable but not required); vii) it must be shown that the testimony was freely and voluntarily made, without duress. *Id.* at 211-12, 88 S.E.2d at 171. The eighth requirement requested by appellant was that it be shown that the recording does not contain matters otherwise not admissible.

[35]The court felt that requirements 1, 2, 4, 5, and 6, *see* note 34 *supra*, were merely methods of assuring authenticity and so the first requirement encompasses those points in *Solomon.* The court also noted that *Solomon* requirements 4 and 5 are resolved by conforming to the Indiana chain of custody rule.

[36]This is the eighth requirement that the appellant requested. The court admitted that it was sound and that other jurisdictions recognize it. *E.g.*, Leeth v. State, 94 Okla. Crim. 61, 230 P.2d 942 (1951); Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); State v. Meyer, 37 Wash. 2d 759, 226 P.2d 204 (1951). It could be reasoned by analogy that this was in fact the law in Indiana. In Lee v. State, 213 Ind. 352, 12 N.E.2d 949 (1938), it was held that if a part of a paper received in evidence is competent, but the paper also contains matters incompetent, the whole may properly go to the jury if the objectionable portion is obliterated or sealed off so it cannot be read.

[37]282 N.E.2d at 797.

[38]297 N.E.2d 409 (Ind. 1973).

motion was overruled. On appeal the supreme court ruled, in accordance with statutory and prior case law, that this was reversible error.[39] In dictum the court questioned the soundness of the statute and indicated that a jury view should be a judicial prerogative.[40] However, the court was particularly reluctant to strike down the law, when the consequences would be to deny the defendant, under a life sentence, a new trial. This indication of a desire to follow the judicial prerogative, espoused by noted commentators,[41] serves as a signal to the legislature to step aside and allow the court to exercise its prerogative.

B. Impeachment

1. Pretrial Mental Examination to Determine Credibility of Rape Victims

Two cases involving pretrial psychiatric examinations of rape prosecutrixes clarified prior law in Indiana. In *Allen v. State*[42] the defendant in a rape case made a motion for a psychiatric examination of the prosecuting witness to determine her credibility. This motion was denied and defendant amended it to include examination to determine competency. This motion as to competency was granted. The defendant was convicted and on appeal claimed the trial court erred in overruling his first motion. Defendant relied

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[39] *Id.* at 412. The statute covering this point reads in part:

> Inspection of place.—Whenever, in the opinion of the court and with the consent of all the parties, it is proper for the jury to have a view of the place in which any material fact occurred . . . .

IND. CODE § 35-1-37-3 (1971). In Barber v. State, 199 Ind. 146, 155 N.E. 819 (1927), the court held that in light of this statute, sending a jury to view in a criminal case, without the defendant's consent, was reversible error.

[40] 297 N.E.2d at 412.

[41] MCCORMICK § 216, at 537; 4 J. WIGMORE, EVIDENCE § 1163, at 273 (3d ed. 1940).

> That the Court is empowered to order such a view, in consequence of its ordinary common-law function, and irrespective of statutes conferring express power, is not naturally to be inferred, but is clearly recognized in the precedents.

Id. § 1163, at 268. Wigmore also states:

> Statutes now regulate the process in almost every jurisdiction of the United States, but it may be assummed that the judicial power to order a view exists independently of any statutory phrases of limitation.

Id. § 1163, at 273.

[42] 283 N.E.2d 557 (Ind. Ct. App. 1972).

on *Burton v. State*[43] which held that a sex offense charge should not go to a jury unless a physician has examined the victim's social history and mental make-up.[44] A later case, *Wedmore v. State*,[45] modified this. In that case the defendant did not move for an examination nor did he question the competency of the witness. Agreeing with the dissent in *Burton*, the court held that there is no requirement that the examination be a condition precedent to the witness' testifying.[46] The *Allen* case raised the question of whether or not it was error to refuse a defendant's motion for such an examination; this question was not raised in *Wedmore*, as the defendant there made no such request. The court of appeals, following the indications of *Wedmore*, held that it was not error to refuse such motions.

A subsequent case in the court of appeals reaffirmed this position. The defendant in *Rickard v. State*[47] contended that a psychiatric examination of the prosecutrix in sex cases should be had to determine her credibility. He also relied on *Burton*, but the court noted that *Burton* has been superseded by *Wedmore* and found no error. Although the requested rule appears sound, indications are that if it is to be established, it must be done by the legislature.[48]

2. *Specific Acts*

The supreme court emphasized the Indiana rule on impeachment by specific acts in *Boles v. State*.[49] In *Boles* the defendant was

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[43]232 Ind. 246, 111 N.E.2d 892 (1953).

[44]*Id.* at 251, 111 N.E.2d at 894, *citing* 3 J. WIGMORE, *supra* note 41, § 924(a). Professor Wigmore advocated that such examination be conducted for the purpose of ascertaining the witness's probable credibility.

[45]237 Ind. 212, 143 N.E.2d 649 (1957).

[46]*Id.* at 223, 143 N.E.2d at 653. *See also* Bryant v. State, 271 N.E.2d 127 (Ind. 1971); Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964).

The dissent in *Burton* stated:

> Our legislature has not seen fit to require such as a condition precedent to the right to testify in court and I do not believe this court has any right to impose it.

232 Ind. at 260, 111 N.E.2d at 898. (Draper, J., dissenting).

[47]291 N.E.2d 916 (Ind. Ct. App. 1973).

[48]Wigmore also recognizes that a rule requiring any complaining witness in a sex offense case to undergo a psychiatric examination to determine competency and credibility should require a legislative mandate. 3a J. WIGMORE, *supra* note 41, § 924(a) (Chadbourn rev. 1970).

[49]291 N.E.2d 357 (Ind. 1973).

convicted of second degree burglary. During the trial, one Stephenson testified as a State's witness. On cross-examination he was asked if he had ever been convicted of a felony, to which he replied no. A later witness was asked on cross-examination by the defense if he knew that the witness Stephenson was a drug user. An objection was sustained. On appeal the defendant claimed that the question was relevant as bearing upon Stephenson's credibility. The supreme court ruled that the question was properly excluded because although the witness's credibility is a proper subject of inquiry, the defense's methods were improper. The court quoted the law in Indiana that a witness may not be impeached by inquiry as to specific acts of immorality.[50]

Another case involving inquiries into specific acts of misconduct was *Shropshire v. State*.[51] There the appellant was convicted of first degree burglary. He assigned as the sole error that his cross-examination violated his due process rights and that the trial court erred in requiring him to answer highly prejudicial questions. During the trial the prosecutor inquired if the defendant had ever been arrested and convicted for first degree burglary. When he answered no, he was asked if he had when he was a minor. The defendant answered a series of such questions, some under order of the judge. The supreme court agreed with the appellant and held that he was denied a fair and impartial trial. The court noted that when a defendant takes the witness stand, he may be cross-examined concerning his credibility, but that the State is not permitted to inquire into specific acts of misconduct other than prior convictions.[52] Additionally, the court stated that actual convictions in a juvenile court are inadmissible for impeachment pur-

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[50]*Id.* at 361. Woods v. State, 233 Ind. 320, 119 N.E.2d 558 (1954); Forman v. State, 203 Ind. 324, 180 N.E. 291 (1932); Davis v. State, 197 Ind. 448, 151 N.E. 329 (1926).

Professor McCormick notes that the majority of courts limit cross-examination concerning acts of misconduct as an attack on character to those acts having some relation to the witness's credibility. Other courts allow attack by a fairly wide-open cross-examination about acts of misconduct which show bad moral character and have but an attenuated relation to credibility. Finally, he notes that a substantial number of courts (among them Indiana) prohibit cross-examination altogether as to acts of misconduct for impeachment. McCormick advocates the latter as the fairest and most expedient because of the dangers of prejudice, distraction, confusion, and abuse by the asking of unfounded questions, etc. McCormick § 42.

[51]279 N.E.2d 225 (Ind. 1972).

[52]*Id.* at 227. Hensley v. State, 268 N.E.2d 90 (Ind. 1971); Woods v. State, 233 Ind. 320, 119 N.E.2d 558 (1954).

poses.[53] Therefore, the inquiry by the prosecutor about convictions while the defendant was a minor was inadmissible for impeachment purposes.

A significant case that will affect the area of impeachment is *Ashton v. Anderson*[54] in which the supreme court restricted the use of prior convictions for the purposes of impeachment. At trial, defense counsel inquired of a witness whether or not he had ever been arrested. Objection was made and properly sustained.[55] The attorney then asked whether the witness had "ever plead [*sic*] guilty or been convicted of any criminal offense." Again defendant objected and the objection was sustained. However, on appeal the court of appeals held that it was error to disallow this second question and granted a new trial. The court of appeals rested its decision on the case of *McMullen v. Cannon*,[56] which stated that the established rule in Indiana was that a witness, including a party to the action, who takes the stand as a witness in his own behalf, can be required on cross-examination, on the issue of his credibility, to answer questions as to previous convictions, whether felonies or misdemeanors.[57]

The supreme court recognized the rule set forth in *McMullen* but noted that it was a point of first impression whether a witness may be impeached by *any* prior conviction for *any* criminal offense without regard to the nature of the offense or its tendency to reflect on the credibility of the witness. Prior case law indicated that any fact that might have been shown to render a witness incompetent under statute might be shown to affect his credibility.[58]

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[53]Woodley v. State, 227 Ind. 407, 86 N.E.2d 529 (1949). The relevant Indiana statute states:

> The disposition of a child or any evidence given in the juvenile court shall not be admissible as evidence against the child in any case or proceeding in any other court . . . .

IND. CODE § 31-5-7-15 (1971).

[54]279 N.E.2d 210 (Ind. 1972).

[55]Shropshire v. State, 279 N.E.2d 219 (Ind. 1972); Hensley v. State, 268 N.E.2d 90 (Ind. 1971); Boles v. State, 291 N.E.2d 357 (Ind. Ct. App. 1973).

[56]129 Ind. App. 11, 150 N.E.2d 765 (1958).

[57]*Id.* at 12, 150 N.E.2d at 766.

[58]Niemeyer v. McCarty, 221 Ind. 688, 51 N.E.2d 365 (1943); Glenn v. Clore, 42 Ind. 60 (1873). The statute that these cases referred to is now IND. CODE § 34-1-14-14 (1971) which reads:

It also held that the extent to which such cross-examination shall be allowed is within the trial court's discretion.[59] In reaching its decision, the court stated that it could perceive no reason that a trial court should be bound to permit questions about crimes such as speeding, etc., without regard to the nature of the crime or its tendency to reflect the witness's credibility.[60] The court also held the exclusion of such evidence should not be discretionary. Either the particular conviction reflects the witness's credibility for truth and veracity or it does not. If it has a bearing, it should be admitted; if not, it should be excluded. In so holding, prior case law in Indana was overruled, and now for the purposes of impeachment under Indiana Code sections 34-1-14-13 and 35-1-31-6 only those convictions for crimes involving dishonesty or false statement shall be admissible. However, the court is also bound by Indiana Code section 34-1-14-14, which permits impeachment by a showing of prior convictions for crimes which would have ren-

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> Any fact which might be shown to render a witness incompetent, may be hereafter shown to affect his credibility.

The statute which defined what convictions would render a witness incompetent read:

> Every person, who may hereafter be duly convicted of the crimes of treason, murder, rape, arson, burglary, robbery, manstealing, forgery, or wilful and corrupt perjury, shall, ever after such conviction, be deemed infamous, and shall be incapable of . . . giving evidence in any court of justice.

IND. REV. STAT. ch. 54, § 79 (1843).

Parker v. State, 136 Ind. 284, 35 N.E. 1105 (1894), established that prior convictions could be inquired into on cross-examination to show the depraved moral character of the witness as affecting his credibility. Subsequently, in Dotterrer v. State, 172 Ind. 357, 88 N.E. 689 (1909), a witness was asked on cross-examination whether he had previously been convicted of assault and battery. The court recognized that assault and battery was not an infamous crime and held such questioning was proper. The court noted a statute which stated that in all questions affecting credibility of a witness, his general moral character may be given in evidence, and held that it applies to cross-examination of a witness.

The statute which the *Dotterrer* court referred to is IND. CODE § 35-1-31-6 (1971). The same language is also used in *id.* § 34-1-14-13, and thus the *Ashton* court noted that the ruling in *Dotterrer* would be applicable to it also.

[59]Way v. State, 224 Ind. 280, 66 N.E.2d 608 (1946); Robinson v. State, 197 Ind. 148, 149 N.E. 888 (1925); Parker v. State, 136 Ind. 284, 35 N.E. 1105 (1894).

[60]"It is illogical to assume that a conviction of *any* crime reflects, *ipso facto*, on the credibility of the witness as to truth and veracity." 279 N.E.2d at 215.

dered a witness incompetent, *i.e.*, treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and wilful and corrupt perjury.[61] These are the only prior convictions admissible to impeach.

One final case should be noted in clarifying the use of prior convictions. In *Sipes v. State*[62] it was held that it was proper for the trial judge to refuse to permit the defense counsel to impeach a witness with a prior conviction when the question failed to include the specific offense and the court and date of conviction.[63] Apparently, prior convictions will now be inadmissible unless these facts are shown.

3. Use of Admissions for Impeachment

In *Johnson v. State*,[64] the Supreme Court of Indiana decided the question of whether evidence of admissions of guilt made by defendant to a probation officer were admissible for impeachment purpose even though inadmissible as evidence of guilt of the crime charged. The appellant and a companion apparently carried cans containing combustibles into a building with the intent of setting it on fire. When confronted by three men they threatened them with weapons and then fled.[65]

The appellant first entered a plea of guilty and was assigned a probation officer who interviewed him. The appellant contended that the trial court erred in allowing the testimony of the probation

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[61]Under the proposed federal rules, evidence of prior convictions is admissible only if the crime is punishable by death or imprisonment in excess of one year or involves dishonesty or false statement. If the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice, he can refuse to admit it. The rules also place a time limit of ten years after which evidence of the crime is inadmissible. *Proposed Fed. R. of Evid.* rule 609, H.R. 5463, 93d Cong., 1st Sess. (1973), *reported in* 119 CONG. REC. 5452 (daily ed. June 26, 1973) [hereinafter cited as *Proposed Fed. R. of Evid.*].

[62]293 N.E.2d 224 (Ind. Ct. App. 1973).

[63]*Id.* at 227.

[64]284 N.E.2d 517 (Ind. 1972).

[65]Appellant contended at trial that the evidence that he and his companion put the cans in the building was merely circumstantial. In Vaughn v. State, 255 Ind. 678, 266 N.E.2d 219 (1971), however, it was held that a conviction may be sustained by circumstantial evidence. The fact that appellant fled is also relevant in proving his guilt. Turner v. State, 255 Ind. 427, 265 N.E.2d 11 (1970). *See also* note 14 *supra*. *Contra*, note 12 *supra*.

officer in rebuttal, since the testimony concerned a conversation the probation officer had with the appellant during which the appellant made admissions. The court held that such testimony was inadmissible as evidence of guilt of the crime charged, but that the testimony could be considered for impeachment purposes. In reaching its decision the court relied on *Harris v. New York*,[66] which adopted the restricted view of the privilege of self-incrimination.

It should also be noted that the appellant in *Johnson* contended that the trial judge erred because he did not determine whether the confession was voluntarily given before it was received into evidence.[67] This contention was dismissed by the court since the appellant did not raise any objection as to the voluntariness of the confession or the failure to apply the relevant statute at the trial level.[68]

4. Bias

It is a recognized principle of law in Indiana that the trial court in its discretion has wide latitude in permitting cross-examination to test the credibility of a witness by disclosing his interest in a case.[69] *Brooks v. State*[70] involved such a cross-examination and its permissible scope. The appellant was convicted of assault and battery with intent to kill. The defendant in cross-examining a prosecution witness elicited the fact that the witness had a civil law suit for damages pending against the defendant's employer.[71] Such cross-examination is proper in attempting to show the witness

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[66]401 U.S. 222 (1971). In *Harris* the Supreme Court held that evidence inadmissible against an accused in the prosecution's case is not barred for all purposes, provided that the trustworthiness of the evidence satisfies legal standards. According to the Court in *Harris* the shield provided by Miranda v. Arizona, 384 U.S. 436 (1966), is not a license to use perjury as a defense.

[67]IND. CODE § 35-5-5-1 (1971). Pursuant to this statute the trial judge must determine that the confession was given voluntarily before it is admitted into evidence. The trial judge can then permit the jury to hear relevant evidence on the issue of voluntariness.

[68]284 N.E.2d at 520, *citing* Guthrie v. State, 254 Ind. 356, 260 N.E.2d 579 (1970). *Guthrie* stands for the principle that when an argument on appeal is of a different nature than the grounds for objection at the trial, no question is raised for review.

[69]Blue v. State, 224 Ind. 394, 67 N.E.2d 377 (1946), *cert. denied*, 330 U.S. 840 (1947).

[70]291 N.E.2d 559 (Ind. 1973).

[71]*Id.* at 560.

has an interest in the case.[72] The counsel for defendant also tried to obtain information concerning the amount of damages prayed for in the civil suit. Defense counsel argued that it was highly possible that the witness would falsify his testimony to insure a conviction and use this to his advantage in the civil suit. The trial court sustained an objection to the inquiry concerning the amount of damages sought on the ground that this would not have any bearing on the bias of the witness.[73] The court determined that the appellant in his cross-examination had made it clear to the jury that the prosecution witness had a civil suit pending which could raise an inference of prejudice. The supreme court refused to substitute its judgment for that of the trial court.[74]

An additional point which should be mentioned in *Brooks* concerned an attack on the character of the prosecuting witness during appellant's cross-examination. This challenge to the character of the witness was clearly outside the scope of the direct examination. The general rule in Indiana is that the scope of the cross-examination should be limited to the subject matter of the direct examination.[75] Thus, in *Brooks* the Indiana Supreme Court reaffirmed several of the traditional principles pertaining to cross-examination.

C. Hearsay

The Supreme Court of Indiana and the Indiana Court of Appeals have recently decided three significant cases involving the question of hearsay. Hearsay evidence is testimony of an out of court statement offered for the truth of the matter asserted there-

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[72]McCORMICK § 40, at 79.

[73]Pending of civil litigation is admissible to show the bias of a witness. Hughes v. State, 212 Ind. 577, 10 N.E.2d 629 (1937). The court in *Brooks*, however, felt that because the amount of damages sought is often exaggerated and is seldom an accurate appraisal of what plaintiff really wants, it has no effect on the bias of a witness.

[74]The *Brooks* court followed the familiar rule in Indiana which states that only a clear abuse of discretion by the trial court will call for a reversal. In the court's opinion the trial court committed no abuse of discretion in *Brooks*. 291 N.E.2d at 560.

[75]The court cited Hicks v. State, 213 Ind. 277, 11 N.E.2d 171 (1937), *cert. denied*, 304 U.S. 564 (1938), for this Indiana rule. 291 N.E.2d at 562.

See McCORMICK § 27, at 54. Professor McCormick offers an excellent discussion on the scope of cross-examination and the merits of the systems of restricted cross-examination, which Indiana presently has, and wide-open cross-examination, which is included in the *Proposed Fed. R. of Evid.* rule 611(b).

in.[76] The statement's value rests upon the credibility of the out of court declarant.

1. Admission of Party-Opponent

In the case of *Moore v. Funk*[77] the Indiana Court of Appeals considered a recognized exception to the hearsay rule known as an admission of a party-opponent.[78] *Moore* involved an automobile accident in which plantiff's car was hit in the rear by defendant. The collision pushed the plantiff's car into oncoming traffic where it was hit again by another car. Defendant subsequently pleaded guilty to a charge of following too closely. Plaintiff introduced, without objection, this guilty plea to show an admission against interest. An instruction requested by defendant regarding the introduction of the guilty plea and the court's acceptance of the instruction constituted the main issue before the court.[79]

Defendant contended that the testimony concerning the conviction for following too closely could not be considered on the question of the right of plaintiff to recover but only on the question of credibility.[80] The court decided that defendant's requested instruction was an inaccurate statement of the law. Since defendant never denied pleading guilty to the charge of following too closely, she was in a position of explaining her guilty plea and rebutting the inference of negligence that it raised.[81] The only apparent reason for plaintiff to introduce the guilty plea was to establish the defendant's negligence. Defendant's instruction inferred that the only reason for introducing the guilty plea was for impeach-

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[76]McCormick § 246, at 584.

[77]293 N.E.2d 534 (Ind. Ct. App. 1973).

[78]McCormick § 262, at 628. McCormick defined an admission of a party-opponent as the words or acts of a party-opponent, or of his predecessor or representative, offered as evidence against him.

It should be noted that the court in *Moore* used the phrase "admissions against interest" in the opinion. This is a common phrase in judicial opinions, according to McCormick, but it tends to confuse two distinct exceptions to the hearsay rule. A declaration against interest and an admission of a party-opponent are the two exceptions to the hearsay rule which are often confused. When the court in *Moore* uses the phrase "admissions against interest," it is referring to admissions of a party-opponent and not declarations against interest.

[79]293 N.E.2d at 539.

[80]*Id.*

[81]*Id. See also* Richey v. Sheaks, 141 Ind. App. 423, 228 N.E.2d 429 (1967).

ment purposes. Defendant never denied making the guilty plea. Therefore, if the purpose of the introduction of the guilty plea was for impeachment purposes, the instruction was inaccurate.[82]

In another automobile accident case decided by the Indiana Court of Appeals, the issue of an admission of a party-opponent was raised once again. In *Beard v. Dodd*[83] a guest passenger testified that the defendant-driver was driving approximately seventy miles an hour when the accident occurred. The defendant offered a witness who testified that the plaintiff-passenger had previously told her that the defendant-driver was traveling thirty to thirty-five miles an hour. The plaintiff then offered rebuttal witnesses to substantiate her prior statement concerning her original estimate of seventy miles an hour. The defendant objected to these rebuttal witnesses, but the objection was overruled.[84]

The court of appeals concluded that the statement of the appellee-passenger that the appellant-driver was driving thirty to thirty-five miles an hour was an admission. Since the statement was an admission, it was direct and original evidence rather than impeaching evidence.[85] The court drew a distinction between admissions by party witnesses and admissions by nonparty witnesses. A nonparty witness has the opportunity to offer evidence of prior consistent statements to rebut evidence of inconsistent statements.[86] The exception to this rule arises in the case of admissions by a party-opponent like in *Beard*.[87] An inconsistent statement or

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[82]*See* 1 E. CONRAD, MODERN TRIAL EVIDENCE § 475, at 376 (1956). Conrad states that the undenied, unexplained, or unmodified admissions of a party have substantive weight. An admission is not binding nor conclusive upon a party if he subsequently modifies or explains it.

[83]296 N.E.2d 442 (Ind. Ct. App. 1973).

[84]*Id.* at 443.

[85]*See* note 3 *supra*. *See also* MCCORMICK §§ 39, at 78, 251, at 601. McCormick states that under the traditional hearsay rule exceptions, particular inconsistent or consistent prior statements of a witness may be admissible as substantive, relevant evidence as well as for impeachment purposes. The prior statement is admissible as substantive evidence only when it falls within one of the exceptions to the hearsay rule. Admissions of a party-opponent is one of the exceptions.

[86]296 N.E.2d at 444. *See also* MCCORMICK § 49, at 103-07.

[87]Logansport & Pleasant Grove Turnpike Co. v. Heil, 118 Ind. 135, 20 N.E. 703 (1888). This case held that when a party makes admissions they come into evidence as original evidence. This principle is based upon the idea that admissions of a party against his interest are made because they accurately represent the facts. 296 N.E.2d at 445.

an admission was shown and the appellee-passenger could not rebut this testimony by calling other witnesses to support the original statement. Thus, the court in *Beard* distinguished an admission used as substantive evidence from impeaching testimony used to discredit a witness.

2. *Spontaneous Declaration*

A third case, *Moster v. Bower*,[88] involved another exception to the hearsay rule. In *Moster* a suit was brought by a sporting goods store clerk to recover for injuries he sustained as the result of an explosion and fire. The explosion demolished the store and killed the defendant-administratrix' decedent who was a customer in the store at the time of the accident. The circuit court had directed a verdict for the administratrix.

The *Moster* case involved the spontaneous declaration exception to the hearsay rule. Closely associated with this exception is the *res gestae* exception also discussed at length in *Moster*.[89] Spontaneous declarations, *res gestae*, and excited utterances are interrelated and the *Moster* court used all of these terms. The most significant aspect of the case is the relationship between *res gestae* and the Indiana Dead Man's Statute.[90]

The proprietor of the demolished store happened to be driving to the store when the accident occurred, and upon his arrival he assisted the plaintiff from the entrance of the store.[91] The plaintiff

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[88]286 N.E.2d 418 (Ind. Ct. App. 1972).

[89]*See* 1 E. CONRAD, *supra* note 82, § 381, at 304. Conrad states that the term *res gestae* includes those exceptions to the hearsay rule which relate to declarations or acts concomitant with the fact in issue and which tend to illustrate or explain it. The term includes acts, statements, occurrences and circumstances which are substantially contemporaneous with the main fact and are so closely connected with it as to form a part of the main transaction. *See also* MCCORMICK § 297, at 704. McCormick states that the term *res gestae* has a close and significant relationship to another exception to the hearsay rule known as excited utterances.

[90]IND. CODE § 34-1-14-6 (1971) provides:

> In suits or proceedings in which an executor or administrator is a party involving matters which occurred during the lifetime of the decedent where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator; any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate . . . .

[91]286 N.E.2d at 421.

said something to the proprietor about a man's firing a gun into a stack of shotgun shell primers in the store as they hurried across the street. At trial, plaintiff's counsel asked the proprietor what plaintiff had said at the scene of the accident. Defendant's counsel objected, and the objection was sustained.[92]

The court of appeals noted that the Dead Man's Statute was enacted to prevent fraud against a decedent when the decedent had no chance to answer and defend himself. The court, however, turned to two cases which held that even though a declarant is incompetent to testify as a witness, this will not ordinarily affect the admissibility of his statements under the *res gestae* rule.[93] The reliability of *res gestae* declarations was recognized by the *Moster* court, and it was stated that the Dead Man's Statute in Indiana has no application to a statement which is part of the *res gestae*.[94]

D. Sufficiency of the Evidence

A series of recent Indiana cases dealt with the amount of evidence necessary to sustain a conviction for possession of narcotics equipment with the intention to unlawfully administer narcotics.[95] In the case of *Bradley v. State*,[96] the Indiana Court of Appeals considered the question of whether a showing of mere possession of narcotics equipment was sufficient to sustain a conviction absent other evidence tending to prove intent to administer narcotics.

The defendant in *Bradley* had thrown to the ground a wrapped package containing an eyedropper with a needle attached when a police officer approached. The policeman searched the defendant and found a bottle cap with burns on the bottom of it. The defendant was indicted for possession of narcotic-adapted instruments with the intent to administer narcotic drugs and was

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[92]*Id.*

[93]Kenney v. Phillipy, 91 Ind. 511 (1883); Walker v. State, 162 Tex. Crim. 408, 286 S.W.2d 144, *cert. denied*, 350 U.S. 931 (1955), *cited in* 286 N.E.2d at 425-26.

[94]286 N.E.2d at 426.

[95]Von Hauger v. State, 266 N.E.2d 197 (Ind. 1971); Taylor v. State, 257 N.E.2d 383 (Ind. 1971); Eskridge v. State, 281 N.E.2d 490 (Ind. Ct. App. 1972); Dabner v. State, 279 N.E.2d 797 (Ind. Ct. App. 1972).

[96]287 N.E.2d 759 (Ind. Ct. App. 1972).

convicted.[97] The prosecution was required to prove three elements to obtain conviction.[98] It was defendant's contention that the prosecution failed to prove unlawful intent. Previous Indiana cases had found unlawful intent through evidence of flight, abandonment of a package, previous convictions, and admissions of narcotic use.[99] The question in *Bradley* was whether flight accompanied by attempted concealment constituted sufficient proof of intent.[100]

In reversing the conviction, the court of appeals stated that the evidentiary value of flight was tenuous since flight alone could not support a conviction especially when an explanation was offered.[101] The act of concealment was merely a suspicious circumstance and, according to the court, was insufficient to prove the requisite intent.[102]

In contrast to *Bradley*, the Indiana Court of Appeals in *Harms v. State*[103] held that evidence of flight while being held on a charge is admissible upon the issue of guilt. In *Harms* the court held that the subjective statements of the defendant as to his reasons for fleeing went to the weight of the evidence and not to its admissibility. This holding suggests a conflict with some of the statements in *Bradley* respecting the evidentiary value of flight.

Tomlin v. State[104] dealt with an issue concerning the sufficiency of medical testimony in a sanity case. After pleading guilty, the appellant had been convicted of robbery while armed with a deadly weapon. He requested that the guilty plea be set aside on the ground that he had a mental problem, and the request was granted. The court appointed two physicians to examine the

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[97]*Id.*

[98]Ch. 90, § 2, [1961] Ind. Acts 169 (repealed 1973). Pursuant to this statute the prosecution must prove that a person had possession of narcotic equipment, that the equipment was adapted for the use of narcotic drugs by injection into a human, and that the person who possessed the narcotic equipment had intent to unlawfully administer the drugs.

[99]*See* note 6 *supra.*

[100]287 N.E.2d at 762.

[101]*See also* McAdams v. State, 226 Ind. 403, 81 N.E.2d 671 (1948), *cited in* 287 N.E.2d at 763.

[102]287 N.E.2d at 763.

[103]295 N.E.2d 156 (Ind. Ct. App. 1973).

[104]283 N.E.2d 363 (Ind. 1972).

appellant who, upon examination, was found mentally capable of standing trial.[105] Appellant then went through the same procedure by pleading guilty and withdrawing the plea, and he was given another medical examination. The second examination found the appellant incompetent, and he was placed in an institution for five months, after which he was found competent to stand trial. Appellant's counsel contended that the testimony of the court appointed physicians was inconclusive and contradictory. In a similar case to that of *Tomlin,* the court held that a conviction need not be reversed on the ground that uncontradicted psychiatric testimony established the defendant's incompetency even though the opinions of the doctors were not absolute.[106] The court in *Tomlin* concluded, therefore, that the testimony of one of the court appointed physicians was sufficient to sustain a finding of sanity.[107]

In *Turner v. State*[108] decided by the Indiana Supreme Court, the issue involved a conviction for manslaughter based upon the uncorroborated testimony of an accomplice. The appellant and two codefendants were charged with first degree murder and murder in the commission of a felony, to wit: robbery. Separate trials were granted to appellant's codefendants. Appellant was tried and found guilty of manslaughter. His main contention was that the trial court erred in refusing to give an instruction concerning the testimony of an accomplice.[109] In Indiana accomplices are competent witnesses when they consent to testify.[110] A conviction in Indiana may be based upon and upheld on the uncorroborated testimony of an accomplice.[111] The court in *Turner* recognized the principle that the testimony of any witness who has an obvious interest in the case should be carefully examined. The jury, and

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[105]*Id.*

[106]Johnson v. State, 255 Ind. 324, 264 N.E.2d 57 (1970).

[107]283 N.E.2d at 364.

[108]280 N.E.2d 621 (Ind. 1972).

[109]*Id.* at 622. The appellant's instruction was offered to inform the jury that the testimony of an accomplice should be closely examined by the jury and weighed according to its credibility.

[110]IND. CODE § 35-1-31-3 (1971).

[111]280 N.E.2d at 624, *citing* Green v. State, 241 Ind. 96, 168 N.E.2d 345 (1960). The court in *Green* made a statement to the effect that the testimony of an accomplice must be received with caution. The instruction offered by appellant in *Turner* reiterated this point.

not the judge, however, determines the credibility of the witnesses and the weight to be given to their testimony.[112] It was the court's opinion that standard instructions given by the court in every criminal trial would provide ample opportunity to an attorney to comment about any bias of a witness.[113]

E. Relevancy

1. Circumstantial Evidence

Although *Brown v. Richards*[114] was decided on a sufficiency of the evidence basis, the crucial issue in the case was whether or not state of mind, knowledge, and mental attitude could be shown by circumstantial evidence. In *Brown,* the plaintiff-appellant's seventeen-year-old son was fatally injured while riding as a guest passenger. The host lost control of the car while piloting it through an S-curve. The plaintiff charged that the accident was the proximate result of wilful and wanton misconduct by the defendant. There were no eyewitnesses to the crash.

In finding for the appellant, the court of appeals, quoting extensively from *Brueckner v. Jones,*[115] stated that in many instances a person's actions are indicative of an indifference to their natural consequences. That is, a person's mental attitude or state of mind may be shown by circumstantial evidence—no declaration or admission is necessary. In fact, such knowledge, like premeditation in criminal prosecutions for murder, is seldom admitted by the defendant in a civil matter.[116] *Brown* agreed with the majority view espoused in both civil and criminal cases.[117] Usually, regardless of the prejudicial effect, evidence tending to show mental attitude and state of mind is admissible and relevant.[118]

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[112]*See* Taylor v. State, 278 N.E.2d 273 (Ind. 1972). The court in *Taylor* thought that it was error for the court to single out a particular witness and make suggestions indicating to the jury that the witness may be testifying falsely.

[113]280 N.E.2d at 625. With this opportunity present, the rights of the appellant are preserved, and the province of the jury is not invaded by the trial court.

[114]277 N.E.2d 910 (Ind. Ct. App. 1972).

[115]146 Ind. App. 314, 322, 255 N.E.2d 535, 540 (1970).

[116]National City Lines v. Hurst, 145 Ind. App. 278, 283, 250 N.E.2d 507, 510 (1969).

[117]*See* 8 IND. L. ENCYCLOPEDIA, *Criminal Law* § 188 (1971).

[118]Such evidence is admissible even though it occurred prior to the commission of the crime. Fausett v. State, 219 Ind. 500, 39 N.E.2d 728 (1942).

2. *Prior Similar Transactions*

Generally in Indiana evidence of prior independent crimes to show a disposition, tendency, or likelihood of the defendant to commit the offense for which he is charged is inadmissible except for the purpose of showing: 1) intent; 2) motive; 3) purpose; 4) identification; and 5) common scheme or plan.[119] A further exception is commonly recognized by this state's courts in prosecutions of crimes involving depraved sexual instinct and in cases involving assault and battery with the intent to rape.[120]

In *Gilman v. State,*[121] the defendant was charged with assault and battery with the intent to gratify sexual desires. On appeal, the defendant's assertion was that his defense was prejudiced when the State introduced evidence of a prior sodomy conviction. The defendant, in attempting to distinguish his case, argued that prior Indiana cases[122] concerned charges for the *same* act involving depraved sexual instinct. The supreme court, however, stating that all that is required is a prior *similar* act showing a depraved sexual instinct, affirmed the conviction.[123] A vigorous dissent[124] supported the defendant's contentions. It pointed out the danger that existed whenever prior acts are used to demonstrate the disposition to commit a subsequent act. All individuals on trial for

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[119]*See, e.g.*, Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950); Hergenrother v. State, 215 Ind. 89, 18 N.E.2d 784 (1939); Gears v. State, 203 Ind. 380, 180 N.E. 585 (1932).

[120]*See* Miller v. State, 268 N.E.2d 299 (Ind. 1971); Kerlin v. State, 265 N.E.2d 22 (Ind. 1970); Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968); Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964). It is of great importance in these cases that the prior acts showing depraved sexual instinct do not have to be with the same person. The general rule is that the similar acts must be with the same person. McCormick § 190, at 449.

[121]282 N.E.2d 816 (Ind. 1972).

[122]*E.g.*, cases cited note 32 *supra.*

[123]The rules of evidence proposed for use in federal courts do not specifically include depraved sexual instinct as one of the exceptions for the admissibility of character evidence. Rule 404(b) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

[124]The dissent filed by Justice Prentice, 282 N.E.2d at 817, was similar to Justice DeBruler's dissenting opinion in Kerlin v. State, 265 N.E.2d 22, 25-26 (Ind. 1970).

sexual offenses should be afforded the same evidentiary safeguards against irrelevant and prejudicial information as any other defendant.[125]

In *Lawrence v. State*,[126] the supreme court was again plagued with the problem of the State's desire to enter prior similar offenses into evidence. The defendant was charged with safe burglary and being an habitual criminal.[127] Both counts were heard at the same time, the evidence of one having been merged with evidence of the other. Again, the court recited Indiana law that evidence of prior offenses was admissible if relevant to show intent, motive, knowledge, plan, identity, credibility, or depraved sexual instinct.[128] However, in *Lawrence* no showing was made that the prior offenses were in any way relevant to the charge of safe burglary. Their sole relevance lay in giving support to the habitual criminal allegation. In adopting the holding of a Connecticut case,[129] the court ruled that the information in such cases should be divided into two parts. The jury should have first heard all of the evidence and pleas for the alleged safe burglary. After having decided that count, the jury would proceed to the habitual criminal charge and the defendant would have an opportunity to change his plea and/or offer all evidence related thereto. Since the procedure employed by the trial court constituted a denial of due process, the high court ordered a new trial.

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[125]Meeks v. State, 249 Ind. 659, 234 N.E.2d 629 (1968). It may be important to point out that the *Meeks* application of depraved sexual instinct was severely criticized in Kerlin v. State, 265 N.E.2d 22 (Ind. 1970).

[126]286 N.E.2d 830 (Ind. 1972).

[127]The Indiana habitual criminal statute, IND. CODE § 35-8-8-1 (1971), reads as follows:

> Every person who, after having been twice convicted, sentenced and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States of America, shall be convicted in any circuit or criminal court in this state for a felony hereafter committed, shall be deemed and taken to be an habitual criminal, and he or she shall be sentenced to imprisonment in the state prison for and during his or her life.

[128]Ashton v. Anderson, 279 N.E.2d 210 (Ind. 1972); Gilman v. State, 282 N.E.2d 816 (Ind. 1972); Schnee v. State, 254 Ind. 661, 262 N.E.2d 186 (1970); Burns v. State, 255 Ind. 1, 260 N.E.2d 559 (1970); Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950). *See also* cases cited note 31 *supra*.

[129]State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921).

F. Experts

1. Expert Testimony

In *DeVaney v. State,*[130] a significant change in Indiana evidentiary law, the supreme court dealt with a litigious conundrum: the expert testifying on an ultimate issue. The defendant was charged with reckless homicide and causing the death of another while under the influence of intoxicating liquor. The court permitted an expert, called by the State, to testify on the ultimate issue in the case—in particular, the expert expressed an opinion that the point of impact was outside the defendant's traffic lane and thus indicated that the defendant crossed the center yellow line. The supreme court held that an expert could direct his testimony to the ultimate issue as long as the jury was free to reject the opinion.[131] By so ruling, the court explicitly overruled numerous Indiana cases[132] and joined a majority of state courts.[133] The reason cited for the change was that the rule forbidding opinion evidence as to ultimate issues was unduly restrictive and burdensome and incapable of uniform application. Furthermore, under the court's new directive there will be no usurpation of the adjudicating function, for an expert is still not permitted to testify as to conclusions of law.[134]

In *Robertson v. State,*[135] the prosecution charged the defendant with driving and operating a motor vehicle while under the influence of an intoxicating liquor. The defendant's primary contention of error on appeal rested on the State's asking his

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[130]288 N.E.2d 732 (Ind. 1972).

[131]Of course, this assumes that the preliminary requirements for an expert's opinions, *e.g.*, that he is qualified, that he is speaking on a subject peculiarly within his knowledge, etc., have been fulfilled. *See* McCormick § 12, at 27.

[132]*See, e.g.*, Stroud v. State, 273 N.E.2d 842 (Ind. 1971) (expert's testimony that newspaper *Screw* had socially redeeming value was inadmissible because it went to ultimate issue); Ellis v. State, 252 Ind. 472, 250 N.E.2d 364 (1969) (expert could not testify as to how a fire started); Baker v. State, 245 Ind. 129, 195 N.E.2d 91 (1964) (expert could not testify as to whether plaintiff was laboring under legal disability).

[133]McCormick § 12, at 27.

[134]This is the general rule although there is an exception when the issue concerns a question of foreign law. *See id.* at 28.

[135]291 N.E.2d 708 (Ind. Ct. App. 1973).

family physician a hypothetical question.[136] Defendant charged that such questioning violated the physician-patient privilege under Indiana Code section 34-1-14-5, which renders a doctor "incompetent"[137] to testify concerning matters communicated to him in the course of a professional service. The court, in upholding the trial court, stated that the mere fact that a doctor was the defendant's physician was immaterial when the question posed was a hypothetical based on facts in evidence. Furthermore, there was nothing in the record to indicate that the physician took into account facts other than those stated in the hypothetical when proffering his conclusion. This ruling reaffirmed prior Indiana case law.[138]

Blackburn v. State,[139] decided by the supreme court, also concerned the issue of expert testimony. The defendant, charged with first degree murder and found guilty of murder in the second degree, alleged on appeal[140] that the court erred in allowing

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[136]The prosecutor asked the doctor to assume the following facts:

> [The man] has the odor of alcoholic beverages about his breath and person, his speech is slurred, he's thick-tongued, hard to understand, he lacks control of his limbs, he's disorganized as to where he is and why, he's loud and boisterous and verbose, he displays, to some extent, a sense of power in the sense that he knows what he can do and what he can't . . . he does not follow instructions . . . he has some lacerations about the face, based on these facts, doctor, and based on your expertise, do you have an opinion as to whether such a man would be under the influence of intoxicating beverage or liquor.

Id. at 710.

[137]The word "incompetent" is probably a legislative oversight. Our legislators probably meant to use "privileged" since there is every indication the patient must claim the physician-patient relationship.

[138]*See, e.g.*, Hauch v. Fritch, 99 Ind. App. 65, 189 N.E. 639 (1934). There is no physician-patient privilege under the Proposed Federal Rules of Evidence. However, rule 504 provides for a psychotherapist-patient privilege. Under that rule a psychotherapist is:

> . . . (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

Rule 504(a)(2).

[139]291 N.E.2d 686 (Ind. 1973).

[140]Another of the defendant's arguments on appeal was that the court erred in allowing two court-appointed psychiatrists to testify during the

the State to cross-examine an expert witness beyond the scope of the direct testimony. The court had allowed the expert to answer a hypothetical question dealing with the mental state of a man who would shoot his wife's lover, if he found the wife and lover together. The lower court reasoned that the question was admissible to determine the witness' opinion on emotional acts. The supreme court affirmed and stated that hypothetical questions may be used in cross-examination to determine the extent of the expert's knowledge and to analyze the standard or foundation for his opinions. Consequently, the cross-examination of an expert through the use of hypothetical questions beyond the scope of the direct examination was held proper and appropriate.[141] This position was an affirmation of prior Indiana case law[142] indicating the necessity for liberality and reasonable latitude when testing an expert's knowledge of the subject-matter.[143]

An expert's testimony was again a point of objection in *Smith v. State,*[144] wherein the defendant was charged with first degree murder. The issue on appeal was whether or not the testimony of two court-appointed psychiatrists was admissible. The defendant charged that the psychiatrists' opinions regarding his sanity were hearsay, since they were based in part on hospital records, the writers of which were not in court for cross-examination. The supreme court, adopting language used in *Birdsell v. United States,* [145] held that opinions based on tests performed by others are not admissible pursuant to the regularly kept records exception to the hearsay rule.[146] However, if an expert is in court and subject to cross-examination, and if that expert customarily

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State's case in chief. The court of appeals stated that court-appointed experts must be placed on the stand after *both* the State's and the defendant's cases. However, for the error to be reversible, the defendant must have shown that it prejudiced his substantive rights. Since the defendant failed to include such a statement, the court rejected this contention of reversible error. 291 N.E.2d at 698.

[141]This seems to be the general rule even in jurisdictions adopting the most restrictive view on scope of cross-examination. McCormick § 22.

[142]*See, e.g.*, McHargue v. State, 193 Ind. 204, 139 N.E. 316 (1923); Wheeler v. State, 158 Ind. 687, 63 N.E. 975 (1902).

[143]Sharp v. State, 215 Ind. 505, 506, 19 N.E.2d 942, 943 (1939).

[144]285 N.E.2d 275 (Ind. 1972).

[145]346 F.2d 775, 779-80 (5th Cir. 1965).

[146]*See* 13 Ind. L. Encyclopedia *Evidence* § 162 (1959) for a general discussion of "regularly kept records" as an exception to the hearsay rule.

relies on reports made by qualified personnel, he may state an opinion based at least in part on the report.[147] There was no reason to deprive the expert of the tools ordinarily used in making his diagnosis merely because he took the witness stand. Of great import to the court was the high reliability of reports. Additionally, with the complexity of and specialization in medicine, it would be difficult, if not impossible, to find a physician who participated in the diagnosis at all levels and phases.

The *Smith* decision appears to have changed Indiana case law.[148] In the past, Indiana courts had ruled that an expert could give an opinion based either on information already in evidence,[149] *e.g.*, testimony of others, or in response to hypothetical questions.[150] By so expanding the traditional rule in *Smith*, the court was assured of receiving not only the opinion of two experts, but also a distillation of reliable information.

2. Experts' Qualifications

The trial court, generally, has great discretion when deciding whether or not it will allow a witness to be categorized as an expert.[151] In *Chappel v. State*,[152] the defendant was convicted of breaking and entering with the intent to commit theft. The defendant's objection was that the police captain should not have been considered an expert in the use of tools for burglary. At trial, the captain testified that the defendant's crowbar could have been used to pry open a door. The supreme court, citing past Indiana authority, defined an expert as one who, either through special training or education *or through experience*, had acquired a special skill or knowledge in a particular area.[153]

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[147]285 N.E.2d at 275, 276.

[148]For a general discussion of evidence based on the testimony of others, see 13 IND. L. ENCYCLOPEDIA *Evidence* § 303 (1959).

[149]Burns v. Barenfield, 84 Ind. 43 (1882).

[150]Mounsey v. Bower, 78 Ind. App. 647, 136 N.E. 41 (1922).

[151]MCCORMICK § 13, at 30.

[152]282 N.E.2d 810 (Ind. 1972).

[153]*See, e.g.*, Patterson v. State, 262 N.E.2d 520 (Ind. 1970) (case involving illegal possession of heroin wherein court stated "extensive experience," 14½ years on the force and graduation from a federal training school, was sufficient); Spencer v. State, 237 Ind. 622, 147 N.E.2d 581 (1958) (in prosecution for forgery of a check, employees of bank were deemed experienced in reading signatures); Dougherty v. State, 206 Ind. 678, 191 N.E. 84 (1934) (in prosecution for possession of burglary tools, ten years experience on police

Here the experts had been on the police force for thirteen years and had spent five of those years as a detective. The court held that such a witness should be allowed to testify to the obvious.[154]

G. Privilege

1. Plea Bargaining

In civil cases, it is well established that communications and acts of a party in furtherance of compromise or settlement of a legal dispute are privileged and, therefore, inadmissible.[155] The rule in criminal cases in Indiana, however, has never been settled. Such communications have been treated as confessions, admissions against interest, and evidence showing a consciousness of guilt. In *Moulder v. State*,[156] the defendant appealed a conviction for involuntary manslaughter. The defendant objected to the admission of a sheriff's statement that the defendant told him that the prosecutor failed to take a plea of guilty for manslaughter. Such a statement, the defendant contended, was made in furtherance of a compromise and consequently should have been privileged. The court of appeals, hearing this case of first impression, reversed the conviction. Any communication relating to plea bargaining was privileged and therefore inadmissible unless there was a subsequent plea of guilty.[157] By so ruling, the Indiana court aligned with the majority of courts[158] and substantially adopted the rule recommended by the American Bar Association in its

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force was sufficient). Furthermore, in all of the above cited cases, the courts stated that the trial courts' rulings should stand unless there was an abuse of discretion.

[154]282 N.E.2d at 812. The supreme court may have expanded the grounds for experts' opinions with this statement. Generally, an expert may give an opinion only on some subject distinctly beyond the ken of the layman. *See* McCormick § 12, at 29. However, here the court went much further and seemingly allowed the expert to state an opinion based on facts within the layman's knowledge.

[155]*See, e.g.*, Northern Ind. Steel Supply Co., Inc. v. Chrisman, 139 Ind. App. 27, 204 N.E.2d 668 (1965).

[156]289 N.E.2d 522 (Ind. Ct. App. 1972).

[157]*See Proposed Fed. R. of Evid.*, rule 410:

> Evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

[158]McCormick § 274, at 665.

Minimum Standards for Criminal Justice.[159] This new Indiana rule will promote an effective criminal court administration by allowing for the disposition of many criminal cases by compromise.

2. *Comment on Refusal to Take Stand*

In *Rowley v. State,*[160] the defendant, convicted of burglary, contended on appeal that the trial court erred when it did not promptly admonish the jury to disregard a statement by the prosecution that there was no evidence indicating that the defendant was not guilty. Indiana's highest court found that the remark violated the defendant's right to a fair trial and reversed the judgment. Indiana statutory law proscribes prosecution commentary on a defendant's refusal to take the stand.[161] Moreover, it is not sufficient for the judge merely to instruct the jury at the end of the case that they are not to consider such a comment. The judge is required to admonish the jury immediately.[162] Furthermore, it is important to note that this long-standing prohibition against commenting on the silence of the accused was constitutionalized by the United States Supreme Court in *Griffin v. California.*[163]

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[159]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 3.4 (Approved Draft 1968).

> Unless the defendant subsequently enters a plea of guilty or *nolo contendere* which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

[160]285 N.E.2d 646 (Ind. 1972).

[161]IND. CODE § 35-1-31-3 (1971) states that the following people are competent as witnesses:

> First. All persons who are competent to testify in civil actions.
>
> Second. The party injured by the offense committed.
>
> Third. Accomplices, when they consent to testify.
>
> Fourth. The defendant, to testify in his own behalf. But if the defendant does not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the court, in such case, in its charge, to instruct the jury as to their duty under the provisions of this section.

[162]Knopp v. State, 233 Ind. 435, 120 N.E.2d 268 (1954); Keifer v. State, 204 Ind. 454, 184 N.E. 557 (1933); Showalter v. State, 84 Ind. 562 (1882).

[163]380 U.S. 609 (1965). In *Griffin,* the highest Court said that the fifth amendment in its bearing on the states through the fourteenth amendment forbids comment by the prosecution on the accused's silence.

H. Miscellaneous

1. Confessions

The concept of treating juveniles by standards different than those applied to adults pervades our statutory scheme. It would be somewhat naive to assume that a juvenile, needing protection when deciding when to drink,[164] marry,[165] or smoking cigarettes,[166] could stand on the same footing as adults when waiving fifth and sixth amendment rights. *Lewis v. State*,[167] an appeal from a conviction of first degree murder, involved the admissibility of a juvenile's confession taken while defendant was under custodial interrogation and without the aid and support of either parents or counsel. The supreme court, in reversing the conviction, held that although a juvenile could waive his rights under the constitution, all efforts must be taken to insure the voluntariness of the confession. Therefore, a juvenile's statement could be used against him if both he and his parents understand his rights to remain silent and to an attorney. This ruling was an affirmation of prior Indiana[168] and federal case law[169] and finds support in the *Model Rules for Juvenile Courts*[170] and *Proposed Indiana*

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[164]IND. CODE § 7-2-1-9 (1971).

[165]*Id.* § 31-1-1-1.

[166]*Id.* § 35-1-105-1.

[167]288 N.E.2d 138 (Ind. 1972), *noted in* 6 IND. L. REV. 577 (1973).

[168]McClintock v. State, 253 Ind. 333, 253 N.E.2d 233 (1969); Sparks v. State, 248 Ind. 429, 229 N.E.2d 642 (1967).

[169]*See, e.g.*, Haley v. Ohio, 332 U.S. 596 (1948); *In re* Gault, 387 U.S. 1 (1967) (confessions of juveniles require special caution).

[170]NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS rule 25 (1968):

> Only testimony that is material and relevant to the allegations of the petition shall be admitted into evidence. No testimony that would be inadmissible in a civil proceeding shall be admitted into evidence.
> No extra-judicial statement by the child to a peace officer or court officer shall be admitted into evidence unless made in the presence of a parent or guardian of the child, or of the child's counsel. No such statement shall be admitted into evidence unless the person offering the statement demonstrates to the satisfaction of the court that, before making the statement, the child and his parents were informed and intelligently comprehended that the child need not make a statement, that any statement made might be used in a court proceeding, and that the child has a right to consult with counsel prior to or during the making of a statement.

Rules of Juvenile Procedure.[171] The rule adopted by the court does not make a juvenile's confession inadmissible per se but only emphasizes the safeguarding procedures deemed necessary to avoid all elements of coercion, duress, or inducement.

2. *Parol Evidence*

Succinctly stated, the parol evidence rule dictates that the terms and conditions of a written agreement cannot be altered, modified, or changed by statements *de hors* the instrument.[172] Or as stated in a recent Indiana decision: "The parol evidence rule states that a written agreement or contract, signed by the parties, is conclusively presumed to represent an integration or meeting of minds of the parties."[173] In *Vernon Fire & Casualty Insurance Co. v. Thatcher*,[174] the defendant appealed from a judgment for fire loss not covered in the insurance policy. The defendant argued that the lower court should have excluded evidence of misrepresentation since the parol evidence rule renders such evidence inadmissible and, therefore, limits the liability to the terms of the policy. Plaintiff-appellee, however, asserted that the complaint for damages did not attempt to change the terms of the instrument but merely alleged misrepresentation. The court upheld the verdict for the plaintiff and stated that the parol evidence rule had never operated to exclude evidence of misrepresentation.[175] A plethora of Indiana cases dating from 1856 had developed this

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> All oral testimony shall be given under oath, and may be given in narrative form.

(The Model Rules were proposed by the Council of Judges of the National Council on Crime and Delinquency.)

[171] REPORT OF IND. CIVIL CODE STUDY COMM'N, PROPOSED JUVENILE PROCEDURE CODE rule 9 (1970):

> Any self-incriminating admission or omission obtained by the juvenile court or its staff during the performance of juvenile court duties, including but not limited to the preliminary inquiry, the period of informal adjustment or the waiver hearing, shall not be admitted at any fact-finding hearing or at any time prior to conviction if the proceeding is transferred to a criminal court over objections thereto made at that time.

[172] Lewis v. Burke, 248 Ind. 297, 305, 226 N.E.2d 332, 337 (1967).

[173] Weaver v. American Oil, 276 N.E.2d 144, 147 (Ind. 1971).

[174] 285 N.E.2d 660 (Ind. Ct. App. 1972).

[175] *See generally* 13 IND. L. ENCYCLOPEDIA *Evidence* § 204 (1959).

proposition.[176] Whenever fraud or misrepresentation is alleged, the evidence is inadmissible to change the instrument but admissible to determine the validity of the contract or the award of damages.[177]

3. Refreshing Memory

It is an established practice that in interrogating a witness an attorney may hand the witness a writing to refresh his recollection. In the case of *LeFlore v. State*,[178] the Supreme Court of Indiana considered this evidentiary rule.

The appellant had been convicted of robbery by a jury. He contended that the trial court erred in denying his request for production of a card file which belonged to a witness for the prosecution.[179] The witness was a police officer who kept a card file at his home. The cards recorded investigations that the policeman had made, and the officer said that he had used the file to refresh his memory prior to trial. The appellant contended that the card file should have been produced at the trial to allow appellant to adequately cross-examine the policeman.

The court relied on two cases in resolving the question as to whether or not the card file should have been made available to the appellant.[180] These cases held that there is a right to have writings produced only when the witness uses the writing while he is on the stand. The policeman in *LeFlore* did not use the notes to refresh his memory while he was on the stand; therefore, the trial court did not err when it refused to order a production of the writing.[181]

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[176]McClure v. Jeffrey, 8 Ind. 79, 83 (1856); Tribune Co. v. Red Ball Transit Co., 84 Ind. App. 666, 151 N.E. 338 (1926); Paxton-Eckman Chemical Co. v. Mundell, 62 Ind. App. 45, 112 N.E. 546 (1916).

[177]In Tyler v. Anderson, 106 Ind. 185, 191, 6 N.E. 600, 603 (1886), the court said that if misrepresentation is used as a defense rather than to invalidate the contract or for damages, the parol evidence rule operates to exclude the information.

[178]281 N.E.2d 876 (Ind. 1972).

[179]*Id.* at 877.

[180]281 N.E.2d at 877-78, *citing* Northern Ind. Pub. Serv. Co. v. W.J. & M.S. Vesey, 210 Ind. 338, 200 N.E. 620 (1936); Lennon v. United States, 20 F.2d 490 (8th Cir. 1927). It is only when the witness uses the writing to refresh his memory while on the stand that there is a right to compel production.

[181]281 N.E.2d at 878.

4. Evidentiary Harpoons

An "evidentiary harpoon" is defined as evidence calculated to prejudice unfairly the minds of jurors against a defendant.[182] In *King v. State*[183] the prosecutor asked the arresting police officer whether or not he had previously known the appellant. The officer testified that he had arrested the appellant ten days previously. Appellant's counsel objected to this testimony as being an "evidentiary harpoon." The *King* court considered the thirteen factors listed in *White v. State*[184] to determine whether sufficient prejudicial harm had been done, but distinguished the case on a different ground. The appellant was tried by the court alone, and it has been held in Indiana that many errors may be practically nullified when no jury is present.[185]

In another "evidentiary harpoon" case, *Brown v. State,*[186] the appellant had been convicted of first degree burglary. During the course of the trial, a police officer was asked if the appellant had said anything when arrested. The policeman answered no, but proceeded to make a reference to the fact that the appellant was an escapee from the reformatory.[187] The defense counsel moved for a mistrial on the ground that this statement unduly prejudiced the jury. The supreme court recognized the principle that it is improper for a witness to inject statements concerning unrelated prior crimes committed by defendant. In the court's

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[182]King v. State, 292 N.E.2d 843, 846 (Ind. Ct. App. 1973).

[183]*Id.*

[184]272 N.E.2d 312 (Ind. 1971). The thirteen factors include: (1) effect of constitutional provisions, statutes, or rules relating to harmless error; (2) degree of materiality of the testimony; (3) other evidence of guilt; (4) other evidence tending to prove the same fact; (5) other evidence that may cure improper testimony; (6) evidence of waiver by injured party; (7) voluntariness of the witness' statement and deliberateness of the prosecutor to present the matter to the jury; (8) penalty assessed; (9) action by defendant or his counsel in partially eliciting the testimony; (10) existence of other errors; (11) existence of a close, clear, or compelling question of guilt; (12) standing and experience of person giving objectionable testimony; (13) repetition of objectionable testimony or misconduct.

[185]Shira v. State, 187 Ind. 441, 119 N.E. 833 (1918). The reason that many errors are nullified is that the trial judge sitting alone is presumed to know what evidence to consider and what prejudicial evidence to reject. In *King* the trial judge made no reference to the police officer's statement in deciding the case, therefore, it may be presumed that the "evidentiary harpoon" had no prejudicial effect on the outcome of the case.

[186]281 N.E.2d 801 (Ind. 1972).

[187]*Id.* at 802.

opinion, however, the statement made by the police officer constituted harmless error for two reasons: the facts given during the trial substantially connected the appellant with the crime and the trial court had sufficiently instructed the jury to disregard the testimony referring to the appellant as an escapee.[188]

5. *Dead Man's Statute*

In the case of *Jenkins v. Nachand*,[189] the court of appeals reviewed the question of whether certain testimony offered was admissible under the Dead Man's Statute. The appellant was involved in a car accident while riding with appellee's decedent. If the appellant had been allowed to testify, she would have told the trial court that appellee's decedent recklessly turned the car into oncoming traffic after appellant had repeatedly warned him not to do so.[190] Appellant's main contention was that the Dead Man's Statute did not preclude her testifying as to matters relating to the collision and occurring during the lifetime of the decedent. She based her contention on the fact that a judgment would not be adverse to the estate of appellee-decedent, but rather against the administrator only to reach an insurance policy. The decedent's heirs or estate did not have any right, title, or interest in the insurance policy and therefore, according to the appellant, a judgment would neither indirectly nor directly affect the estate.[191] The court concluded that appellant's claim would not affect the assets of the estate for two primary reasons. The first was that there was no claim filed against the estate within six months of the first publication of notice as required by statute.[192] Secondly, the estate had been fully administered, distribution made, and the estate closed before a suit was initiated. Considering the intent of the Indiana General Assembly in passing the Dead Man's

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[188]*Id. See* Capps v. State, 282 N.E.2d 833 (Ind. 1972). In *Capps* a police officer testified that the defendant was initially arrested for his suspected connection with the interstate transportation of stolen suits. Appellant contended that the testimony was prejudicial, but the testimony was not objected to at trial nor raised in a motion to correct errors and therefore, the court did not have to rule on it.

[189]290 N.E.2d 763 (Ind. Ct. App. 1972).

[190]*Id.* at 764.

[191]Appellant contended that because a judgment would not affect the decedent's estate in this case, the Dead Man's Statute would be inapplicable. A judgment must affect the estate of the decedent for the statute to operate. *See* note 15 *supra*.

[192]IND. CODE § 29-1-14-1 (1971).

Statute, the court decided that it was reversible error to refuse to allow appellant to testify in this case.[193]

IX. Probate and Trusts*

A. Executors and Administrators

During the survey period the Indiana Court of Appeals decided several cases concerning the administration of decedents' estates. In *Krick v. Farmers & Merchants Bank*[1] the appellant moved to set aside the compromise of an earlier contest of the decedent's will on the ground that he had no notice of the settlement and that the terms of the compromise were not reduced to writing.[2] After his motion was denied, the appellant waited over five years before filing an objection to the administrator's final report.

Though the administration of an estate is considered "one proceeding . . . in rem"[3] many Indiana courts treat collateral or

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[193]The *Jenkins* court felt that it was not the intent of the legislature in enacting the Dead Man's Statute to prevent testimony that could not affect a decedent's estate. 290 N.E.2d at 769.

*Bruce W. Claycombe, Mark T. McDermott, John R. Politan.

[1]279 N.E.2d 254 (Ind. Ct. App. 1972).

[2]Ind. Code § 29-1-9-1 (1971) provides that a will compromise is invalid if not reduced to writing. It should be noted that the appellant filed objections to the will compromise at three different times on the basis of this statute and his lack of actual notice. The first motion was denied by the trial court in September 1964, and no appeal was taken. The second motion was filed over three and one-half years later when the administrator filed his final report. This time the trial court realized its error in failing to comply with the statute and granted appellant partial relief. The administrator subsequently filed a supplemental final report showing that the corrections ordered by the court had been made. The appellant was not satisfied with this order of the court sustaining his objections and filed a Motion to Correct Errors in August of 1970, with substantially the same allegations of error. Denial of this third motion was the foundation for this appeal.

[3]*Id.* § 29-1-7-2 provides:

> The probate of a will and the administration of the estate shall be considered one proceeding for the purposes of jurisdiction, and said entire proceeding and the administration of a decedent's estate is a proceeding in rem.

ancilliary proceedings, such as will contests and creditors' claims, as separate civil actions. Although this practice has been held harmless error,[4] *Krick* exemplifies the confusion which results from this procedure. The distinction between independent civil actions and collateral proceedings arising at different stages in the administration of a decedent's estate is essential in determining when an appeal must be perfected. The court indicated that prior to the adoption of the Probate Code in 1953 the failure to perfect an appeal at the time of the final decision in a collateral action was fatal.[5] However, no cases had specifically dealt with this question since that time. Citing the pertinent sections of the 1953 Probate Code[6] and emphasizing the need for early and speedy administration of estates and finality of decisions, the court dismissed the appeal and concluded that the compromise of a will contest is an adversary proceeding in which the court finally determines the rights of the parties and that the failure to take a timely appeal from such final decision is fatal.[7]

In *Smith v. Carr*[8] the court of appeals reversed and remanded a lower court ruling which allowed the wife of the personal representative of the decedent's estate to recover on a claim against the estate for care and services rendered to the decedent. After the personal representative disallowed his wife's claim, a hearing was held without notice to the heirs and the trial court

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[4]State *ex rel.* Townsend v. Tipton Circuit Court, 242 Ind. 226, 177 N.E.2d 590 (1961).

[5]279 N.E.2d at 259, *citing* Goheen v. Stirlen, 193 Ind. 246, 139 N.E. 359 (1923). Prior to the adoption of the Probate Code in 1953, appeals had always been permitted from judgments in actions to contest the validity of a will or to resist the probate thereof. Allman v. Malsbury, 224 Ind. 177, 65 N.E.2d 106 (1946).

[6]

> In addition, our Probate Code provides that such an appeal of a will contest may be taken as appeals are taken in civil causes. IC 1971, 29-1-1-22 . . . provides:
>
> > . . . *Any person* considering himself *aggrieved by any decision of a court having probate jurisdiction* in proceedings under this code *may prosecute an appeal* to the court having jurisdiction of such appeal. Such appeals shall be taken as appeals are taken in civil causes . . . (emphasis supplied).

279 N.E.2d at 259.

[7]Allowing the parties to delay is expensive, frustrates the decedent's wishes, and dissipates estate assets. 279 N.E.2d at 260.

[8]280 N.E.2d 844 (Ind. Ct. App. 1972).

allowed the wife's claim which amounted to more than one-third of the value of the estate assets.[9] In reversing, the court reasoned that while Indiana Code section 29-1-14-17 speaks only of "a claim in favor of a *personal representative* against the estate he represents,"[10] the claim of the personal representative's wife and the entire transaction as a whole was so intertwined with the interests of the personal representative and the estate that an adversary hearing as contemplated by the statute would "best serve justice and the interests of all parties to this litigation."[11] Noting further that the administrator of an estate occupies a position of high responsibility,[12] the court feared that the lack of notice under the special circumstances of this case[13] could be construed as having a "tendency to deceive, which, regardless of intent, amounts to constructive fraud."[14]

Onward Corp. v. National City Bank[15] was a consolidation of

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[9]The heirs had filed objections to the personal representative's final report and claimed that IND. CODE § 29-1-14-17 (1971) should have been followed. These objections and the heirs' subsequent motion to correct errors were overruled and this appeal resulted. 280 N.E.2d at 845.

[10]IND. CODE § 29-1-14-17 (1971).

[11]280 N.E.2d at 847.

[12]

> The administrator of an estate occupies a position of the highest trust and confidence . . . . It is his duty to guard and protect the estate which he represents against those who may seek to diminish it by representing fraudulent, illegal, or unfounded claims for allowance; and, above all, the duties of his trust forbid him from doing any act or *entering into any arrangement whereby he will gain a personal advantage at the expense of the estate.*

Id. at 846, *quoting from* Gorham v. Gorham, 54 Ind. App. 408, 414, 103 N.E. 16, 18 (1913) (emphasis added).

[13]The court deemed the following factors to be quite relevant to its holding: the claim amounted to one-third of the total assets of the estate; the personal representative was a blood relative of the decedent; the decedent lived in the household of the personal representative for the last period of her life; the husband-wife relationship between the personal representative and claimant; the funds of the personal representative were used in providing, in part, the services for which his wife claimed payment; the wife deposited the claim in a joint checking account from which the personal representative could draw funds; the claim was typed, if not prepared, in the office of the attorney of the estate; and there had been prior "difficulty" in an Illinois estate involving the same decedent and heirs. 280 N.E.2d at 846.

[14]*Id. See* Budd v. Board of County Comm'rs, 216 Ind. 35, 22 N.E.2d 973 (1939); Keilman v. City of Hammond, 124 Ind. App. 392, 114 N.E.2d 813 (1953); Gish v. St. Joseph Loan Co., 66 Ind. App. 500, 113 N.E. 394 (1916).

[15]290 N.E.2d 797 (Ind. Ct. App. 1973).

separate wrongful death actions brought by the personal representative of two decedents' estates for the benefit of the death creditor beneficiaries. Liability was admitted by the appellant and the case was tried solely on the issues of damages. The trial court included in its damages award the personal representative's *total* costs and expenses of administering the entire estates. Appellant contended that the Indiana Wrongful Death Statute[16] allowed recovery only of expenses related directly to the wrongful death action.[17] Indicating that this case was one of first impression in Indiana, the court of appeals affirmed the trial court's application of the statute. Viewing the problem as basically a question of statutory interpretation, the court stated that Indiana statutory[18] and case[19] law mandates that words and phrases of statutes ordinarily be given their plain and usual meaning wherever pos-

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[16]IND. CODE § 34-1-1-2 (1971).

[17]Appellant based his objection on a variety of rationales: first, to allow recovery of the total costs would be an absurdity, not intended by the legislature, because it might result in a situation in which the death creditor beneficiaries would recover greater damages than a surviving spouse or dependent; second, since the statute limits recovery to pecuniary damages, only expenses incurred "as a direct result" of the wrongful death are recoverable; and third, since the expenses of administering the general estate are always incurred, regardless of the cause of death, it is unfair to make them recoverable in an action such as this. The appellant further proposed that the doctrines of strict construction and *ejusdem generis* would so limit the recovery. 290 N.E.2d at 799.

[18]The court referred to IND. CODE § 1-1-4-1 (1971), which states:

> The construction of all statutes of this state shall be by the following rules, unless such construction be plainly repugnant to the intent of the legislature or of the context of the same statute:
>
> First. Words and phrases shall be taken in their plain, or ordinary and usual, sense. But technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

290 N.E.2d at 799-800.

[19]

> We think it is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments out of deference to some supposed intent, or absence of intent, which would prevent the application of the words actually used to a given subject. Such a practice is really substituting the theories of a court, which may, and often do, vary with the personality of the individuals who compose it, in place of the express words of the law as enacted by the lawmaking power. It is a practice to be avoided and not followed. . . .

Id. at 800, *quoting from* Meade Electric Co. v. Hagsberg, 129 Ind. App. 631, 640, 159 N.E.2d 408, 413 (1959).

sible. Since the language of the statute was unambiguous and the contested provision was stated in the conjunctive,[20] the court reasoned that "the statute allows recovery of the costs incurred in *both* administering the general estate *and* prosecuting the wrongful death action."[21]

B. Trusts

Sendak v. Trustees of Purdue University[22] involved an action brought by the Trustees of Purdue University to alter the terms of a charitable trust by removing restrictive terms.[23] The terms, they alleged, frustrated the purpose of the trust which was to promote "education through the medium of making low cost loans available to students."[24] The trial court, after finding that the trustees had been unable to loan even the aggregate income of the fund because of the restrictive administrative provisions, ordered the restrictions removed and empowered the trustees to use the trust assets to make loans to students on substantially the same terms which the trustees established for loans made from the general unrestricted student loan funds. The trial court based its authority for the order on the *cy pres* doctrine.[25]

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[20]The exact language of the statute provides for recovery of the "necessary and reasonable costs and expenses of administering the estate *and* prosecuting or compromising the action . . . ." IND. CODE § 34-1-1-2 (1971) (emphasis added).

[21]290 N.E.2d at 800. The court stated that the *ejusdem generis* doctrine was inapplicant in a case in which the statutory language is clear. As for appellant's contention that recovery for total costs should not be allowed because any general estate will have to be administered whether the death of the decedent was due to a wrongful act or natural causes, the court pointed out that this same logic could be applied to funeral expenses, which will also be inevitably incurred regardless of the cause of death, and yet the statute clearly states that funeral expenses are recoverable by the death creditor beneficiaries. IND. CODE § 34-1-1-2 (1971).

[22]279 N.E.2d 840 (Ind. Ct. App. 1972).

[23]The restrictive conditions which were the subject of the action were:
a. a limitation on amounts of loans to $500.00 per student,
b. a limitation of loans to only those students in their third or more year of study and,
c. a requirement that loans be repaid within five years.
Id. at 842.

[24]*Id.*

[25]
If property is given in trust to be applied to a particular charitable purpose, and it becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more gen-

On appeal, the Attorney General contended that the trial court's application of the *cy pres* doctrine was erroneous since a provision of the settlor's will showed specifically that the "charitable purpose" of the trust was limited in accordance with the three restrictions the trustees sought to remove. The court of appeals upheld the trial court's finding that the charitable purpose of the trust was not limited by the specific restrictions but stated that the doctrine of *cy pres* was nevertheless inapplicable since that general purpose had not become impossible, impractical or illegal, even with the restrictions imposed. However, the court of appeals found that the removal of restrictions to allow the otherwise nearly dormant trust to accomplish its purpose was justifiable under the doctrine of equitable deviation.[26] Specifically, the court of appeals held that evidence of rising tuition, increased living expenses, greater numbers of students attending the university, and a greater need for financial assistance, coupled with other evidence which showed that continued application of the three restrictions in question would cause a further accumulation of assets in the trust with comparatively little aid to needy students, supported the result of the order of the trial court, despite incorrect application of *cy pres*.

In *Hauck v. Second National Bank*,[27] the court of appeals ruled that the trial court erred in admitting extrinsic evidence to permit an explanation of a minor contradiction between the terms of a trust agreement and a schedule of assets accompanying the instrument.[28] After a discussion of Lord Bacon's rule that a latent

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eral intention to devote the property to more charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

RESTATEMENT OF TRUSTS § 399, at 1208 (1935).

[26]

The court will direct or permit the trustee of a charitable trust to deviate from the term of a trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

2 RESTATEMENT (SECOND) OF TRUSTS § 381, at 273 (1959).

[27]286 N.E.2d 852 (Ind. Ct. App. 1972).

[28]This action was brought by the beneficiaries of the deceased, a life tenant of a testate trust established by her husband who died in 1934. Two years prior to the wife's death, she established a trust which directed the

ambiguity may be explained by extrinsic evidence but a patent ambiguity may not, the court applied the "four corners" doctrine and stated that the discrepancy between a phrase in the trust instrument[29] and the dates of acquisition of two stock certificates included in Exhibit A attached to the trust instrument was a "small shadow . . . [which was] blotted out by the white light of overwhelmingly expressed intent of the author of the Trust Agreement."[30] The apparent latent ambiguity could, therefore, be reconciled from a reasonable interpretation of the instrument without admission of extrinsic evidence. The ambiguity was deemed miniscule since Exhibit A included 137 stock certificates, only two of which did not comply with the description in the aforementioned phrase.

C. Wills

In *Pepka v. Branch*[31] the court of appeals was asked to decide whether or not a specific[32] bequest of a sole proprietorship was

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trustee to manage the assets of the life estate so as to pay her the income, and upon her death, to distribute the assets of the trust according to the terms of her husband's will. The basis of plaintiffs' complaint was that since Exhibit A of the wife's trust included property which had acquisition dates prior to the establishment of the husband's testate trust, Exhibit A necessarily included property owned in fee by the wife because of the phrase in the wife's trust instrument which declared that all the original property in the husband's trust had been disposed of and reinvested.

[29]The phrase in which the discrepancy was noted is as follows:

> WHEREAS, all of such property, real and personal, originally passing to me has been disposed of and the proceeds thereof invested and reinvested by me, a schedule of all said property as now existing being attached hereto marked "Exhibit A" . . . .

286 N.E.2d at 857.

[30]*Id.* at 863.

[31]294 N.E.2d 141 (Ind. Ct. App. 1973).

[32]The court pointed out that ademption applies only to specific legacies and not general or demonstrative legacies. *Id.* at 150. A specific legacy is a gift of a specific thing or of some particular portion of the testator's estate, which is so described by the testator's will as to distinguish it from other articles of the same general nature. If the specific bequest is no longer available, the specific legatee is not entitled to satisfaction from the general estate. 6 W. PAGE, WILLS § 48.3 (Bowe & Parker ed. 1962) [hereinafter cited as PAGE]. *See also* Grise v. Weiss, 213 Ind. 3, 11 N.E.2d 146 (1937); Jackson v. Lincoln Nat'l Bank & Trust Co., 147 Ind. App. 466, 469, 261 N.E.2d 899, 901 (1970); *In re* Estate of Brown, 145 Ind. App. 591, 603, 252 N.E.2d 142, 150 (1969).

A general legacy is one which may be satisfied out of the testator's

adeemed by the incorporation of the business. The testator's widow, recipient of a portion of the business under the specific bequest, brought the ademption action. Had ademption occurred, the widow would have taken the entire property under the residuary clause. The court held that incorporation did not so substantially change the bequest as to effect an ademption.[33]

The opinion was limited exclusively to ademption *by extinction* as opposed to other types of ademption.[34] The court recognized three different tests which are used in various jurisdictions to determine when ademption occurs. The first of these is the "ancient rule" which utilizes physical facts as evidence of the testator's intention to adeem.[35] In the past, Indiana has adhered to the ancient rule in which the testator's intent controls. This position was reaffirmed in *In re Brown's Estate*.[36]

A second test is the "modified rule." Under this test the complete, physical disappearance of a specific bequest constitutes an ademption regardless of the testator's intent. If, however, the subject matter still exists in an altered form, this test resorts to the testator's intent.[37]

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estate generally. *See* 6 PAGE § 48.2. A demonstrative legacy is one payable out of the estate generally, but which is charged (as against other legatees or devisees of general gifts) on certain specific property. 6 PAGE § 48.7. Consequently, neither demonstrative nor general legacies are rendered void by the nonexistence of specific property.

[33]294 N.E.2d at 149. The court relied in part on the fact that after incorporation there was no change in the business, its location, or employees. *Id.* at 156.

[34]Although the two larger categories of ademption may be broken down into subparts, ademption by extinction is generally contrasted with ademption by satisfaction. The former occurs when a specific legacy has become inoperative because of the withdrawal or disappearance of its subject matter from the testator's estate in his lifetime. 96 C.J.S. *Wills* § 1172 (1957). Ademption by satisfaction occurs when a gift is made by testator during his lifetime to a legatee, as satisfaction for the legacy. 6 PAGE § 54.21.

[35]The court in *Pepka* cited cases from the jurisdictions adhering to the ancient rule. *See In re* Packham's Estate, 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965); Kapiolani Maternity Hosp. v. Wodehouse, 33 Hawaii 846 (1936); Our Lady of Lourdes v. Vanator, 91 Idaho 407, 422 P.2d 74 (1967); Domzalski v. Domzalski, 303 Mich. 103, 5 N.W.2d 672 (1942); Donath v. Shaw, 132 N.J. Eq. 545, 29 A.2d 555 (1942); *In re* William's Will, 71 N.M. 39, 376 P.2d 3 (1962).

[36]145 Ind. App. 591, 252 N.E.2d 142 (1969).

[37]*See* Succession of Levy, 207 La. 1062, 22 So. 2d 650 (1945); Blaisdell v. Coe, 83 N.H. 167, 139 A. 758 (1927).

The third test used is referred to as the "form and substance" rule or the "modern rule." The focus is shifted from the intention of the testator to the actual existence or nonexistence of the specific subject matter of the bequest. If there has been only a formal change in the bequest, there is no ademption, but if the specific thing has changed in substance, the legacy is adeemed.[38] The form and substance rule, which gained popularity because of dissatisfaction with the confusion and uncertainty created by attempted ascertainment of the testator's intent, is now the majority rule.[39]

The court overruled Indiana's former adherence to the ancient rule and adopted the form and substance test as the rule in Indiana because it is more logical, less cumbersome, and easier to apply. In adopting the form and substance rule, it was necessary for the court to expressly overrule *In re Brown's Estate*[40] and all other Indiana cases inconsistent with the form and substance rule.[41]

A question of first impression for the Court of Appeals of Indiana arose in *Steele v. Chase*.[42] The testator executed a will which left his entire estate to his wife but provided that if his wife did not survive him by thirty days, the estate was to go half to his stepson and half to the testator's brothers. Subsequent to the execution of the will, the testator and his wife were divorced. The testator died without revoking his will or executing a new will. During the administration of the estate the administrator filed a petition for construction of the will and contended that the portions of the will relating to both the testator's wife and his stepson had been revoked by the divorce pursuant to Indiana Code section 29-1-5-8.[43] This statute provides that a divorce subsequent to the

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[38]294 N.E.2d at 152.

[39]The court noted this fact and listed several jurisdictions which adhere to the form and substance test: California, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont, and Virginia. For general discussion of the form and substance test, see Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEXAS TECH. L. REV. 195 (1971); Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741 (1961); Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085 (1953).

[40]145 Ind. App. 591, 252 N.E.2d 142 (1969).

[41]294 N.E.2d at 155.

[42]281 N.E.2d 137 (Ind. Ct. App. 1972).

[43]The statute provides:
If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked.

making of a will automatically revokes all proivsions of the will in favor of the testator's spouse.

The operation of the statute as to the testator's wife was clear from the language of the statute. The issue in the case was whether or not the statute also operated to exclude the stepson. The administrator contended that the bequest to the stepson involved a condition precedent and that the contingent event had not occurred.

While Indiana had not passed on this question, other jurisdictions had. Decisions have gone both ways on the question but the majority view is that property prevented from passing to a former spouse because of revocation by divorce passes as if the spouse failed to survive the testator.[44] The court of appeals construed Indiana Code section 29-1-5-8 in this manner and stated that by doing so, the intent of the testator is satisfied and intestacy which is not favored by the law is avoided.

In the case *In re Estate of Darby*[45] the Court of Appeals of Indiana decided that the beneficiaries of certain trust funds set up by the testator's will were not entitled to the income from these trusts during the administration of the estate absent specific language to the contrary in the will. The testator created identical trusts for the benefit of her two grandnieces for life with the remainder to their respective children. These trusts were each to contain $500,000 and were to be funded first, in the event assets were insufficient to pay all bequests and legacies in full. The grandnieces were also the beneficiaries in trust of the residuary clause in the will. The administrator contended that the income during administration should be treated as part of the corpus of the estate and distributed according to the residuary clause. The

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> Annulment of the testator's marriage shall have the same effect as a divorce as hereinabove provided. With this exception, no written will, nor any part thereof, can be revoked by any change in the circumstances or condition of the testator.

IND. CODE § 29-1-5-8 (1971).

[44]UNIFORM PROBATE CODE § 2-508. The minority view is exemplified by *In re* Will of Lampshire, 57 Misc. 2d 332, 292 N.Y.S.2d 578 (1968), in which it was held that a bequest similar to the one to the stepson in *Steele* was "predicated on a condition set forth therein and limited thereby. The expressed contingency not having occurred, the result is intestacy." *Id.* at 334, 292 N.Y.S.2d at 580. Results conforming to the view of the Uniform Probate Code were reached in First Church of Christ, Scientist v. Watson, 286 Ala. 270, 239 So. 2d. 194 (1970); Volkmer v. Chase, 354 S.W.2d 611 (Tex. Civ. App. 1962); Peiffer v. Old Nat'l Bank & Union Trust Co., 166 Wash. 1, 6 P.2d 386 (1931).

[45]289 N.E.2d 542 (Ind. Ct. App. 1972).

trust beneficiaries contended that they were entitled to the income from the trusts as of the date of the decedent's death rather than as of the date the trusts were funded.

The court based its decision on Indiana Code section 29-1-17-7[46] which provides that *all* income received by the administrator during the administration shall be part of the corpus of the estate, unless the testator provides otherwise. There was no language in the will providing for distribution of the income during administration; therefore, the application of the statute was clear. The case law cited by the beneficiaries in support of their position was decided prior to the enactment of the Probate Code.[47] Adherence to the clear language of the statute promotes the uniformity which is the purpose of the Probate Code.[48]

X. PROPERTY*

A. Real Property

In *Erie-Haven, Inc. v. First Church of Christ*[1] the determinable easement was recognized in Indiana for the first time.[2] The

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[46]The statute provides:

> Unless the decedent's will provides otherwise, all income received by the personal representative during the administration of the estate shall constitute an asset of the estate the same as any other asset and the personal representative shall disburse, distribute, account for and administer said income as a part of the corpus of the estate.

IND. CODE § 29-1-17-7 (1971).

[47]*E.g.*, Alig v. Levey, 219 Ind. 618, 39 N.E.2d 137 (1942). One of the cases cited was decided after enactment of the Probate Code. *In re* Estate of Brown, 145 Ind. App. 591, 252 N.E.2d 142 (1969). This case, however, was held by the court not to support the position of the trust beneficiaries. 289 N.E.2d at 544.

[48]*See* IND. ANN. STAT. § 7-1107, Comments (1953). *See also* Rheinstein, *Some Observations on Wills Under the Indiana Probate Code of 1953*, 30 IND. L.J. 152, 161-63 (1955); Note, *Possession and Control of Estate Property During Administration: Indiana Probate Code Section 1301*, 29 IND. L.J. 251, 264-65 (1954).

*Robert T. Thopy.

[1]292 N.E.2d 837 (Ind. Ct. App. 1973).

[2]As with estates in land, an easement which will terminate automatically upon the happening of a particular event or contingency may be created.

agreement out of which the easement arose provided that the railroad switch track which ran across the servient estate would be the subject of a permanent easement and that the right to use it would be perpetual. It further provided that if any business maintained on the servient tract should be "abandoned and completely discontinued to the extent that the [switch tracks were] no longer being used in connection with the [dominant estate],"[3] then the easement terminated. The stipulated facts showed that there was no business activity on the dominant tract for three years. In reversing the trial court, the court of appeals held that, according to the terms of the agreement, the easement terminated automatically. The case was remanded for a determination of whether or not appellants had knowledge of improvements made by appellee on the dominant tract, and if so, whether an equitable estoppel would arise to preclude appellants from asserting the termination.

Franklin v. Dragoo,[4] a case of first impression in Indiana, determined that the spouse of a cotenant could acquire absolute title to the cotenancy property subsequent to a tax sale. Plaintiff-appellant, Ruth Patterson Franklin, claimed a one-fifth interest in appellee's land by virtue of a cotenancy established on the death of appellant's father, Thomas Patterson. One of the other cotenants, appellant's sister, Blanche Patterson Kilgore, and her husband took possession of the cotenancy property upon the death of Thomas Patterson. The appellees were descendants of Mr. and Mrs. Kilgore. The Kilgores lost possession of the property in 1932 when it was sold to a third party at a tax sale. However, in 1936 Mr. Kilgore reacquired title to the property, but in his name alone. The court of appeals extended the doctrine of inurement[5] to include tax sale acquisitions of cotenancy property by the spouse of a cotenant.[6] However, the primary issue was whether

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Irvin v. Petitfils, 44 Cal. App. 2d 496, 112 P.2d 688 (1941). *See generally* Annot., 154 A.L.R. 5, 33 (1945).

[3]292 N.E.2d at 839.

[4]294 N.E.2d 165 (Ind. Ct. App. 1973).

[5]

> Where one of several tenants in common of an estate purchases the common property at a tax sale, he cannot set up his title thus acquired against the common title, but his tax title inures to the common benefit of himself and his co-tenants . . . .

294 N.E.2d at 166, *quoting from* Butler v. Butler, 63 Ind. App. 533, 537, 114 N.E. 760, 762 (1917).

[6]Other jurisdictions have likewise extended the doctrine to include spouses of cotenants. *See* Annot., 153 A.L.R. 678 (1944).

or not the doctrine applied to acquisitions from third parties after the cotenancy had terminated. The cotenancy ended on expiration of the redemption period following the tax sale to the third party.[7] The court held that in the absence of fraud or collusion, once the cotenancy terminated, the need for the inurement rule was obviated. Since the cotenancy no longer existed, acquisition of the property by Kilgore, the spouse of a former cotenant, could not possibly be against the interest of the appellant, another former cotenant.[8] The 1936 acquisition by Kilgore was clear of any interest claimed by appellant and title vested in him absolutely.

B. Personal Property

The frequently litigated issues of intent and delivery arose in two cases concerning gifts inter vivos. In *Gary National Bank v. Sabo*[9] the court of appeals affirmed the trial court's finding of a gift inter vivos of a $17,000 certificate of deposit. The issue before the court was whether or not there had been sufficient delivery with donative intent. The court cited an 1882 United States Supreme Court decision which stated the general rule for delivery of a chose in action—the instrument or document representing same must evidence a subsisting obligation and be delivered to the donee to vest in him equitable title to the fund it represents and to irrevocably divest the donor of present dominion and control.[10] In *Sabo,* the donor and donee maintained a checking account in joint tenancy with right of survivorship. Plaintiff-appellant bank, executor of the estate of defendant's donor, contended that equitable title did not pass to the donee-defendant because the certificate was endorsed restrictively by the donor.[11] The court stated that when the donor placed his signature on the back of the certificate, the donee had the right to deposit the funds

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[7]The redemption period in 1936 was, as it is today, two years. IND. CODE § 6-1-57-3 (1971).

[8]The court recognized a split of authority on the question and cited the following cases, among others, as representing the more valid position: Koch v. Kiron State Bank, 230 Iowa 206, 297 N.W. 450 (1941); Pease v. Snyder, 169 Kan. 628, 220 P.2d 151 (1950); Ford v. Jellico Grocery Co., 194 Ky. 552, 240 S.W. 65 (1922); Jones v. Jones, 240 La. 174, 121 So. 2d 734 (1960); Corn v. First Texas Joint Stock Land Bank, 131 S.W.2d 752 (Tex. Civ. App. 1939).

[9]279 N.E.2d 248 (Ind. Ct. App. 1972).

[10]Basket v. Hassell, 107 U.S. 602 (1882).

[11]The endorsement consisted of a stamped inscription which read "Pay to the order of Gary National Bank for Deposit Only Bartol Sikich, Sr." This was followed by the signature of the donor. 279 N.E.2d at 250.

represented by it into the joint account. However, the issue of the vesting of equitable title in the donee turned on whether or not the donee could withdraw the proceeds from the account after such a deposit and put the proceeds to her own use without accounting to the cotenant.[12] To decide this issue the court looked to the intent of the donor at the time he signed the certificate. The court held the evidence to be sufficient to support the inference that the stamped restrictive endorsement was placed on the certificate out of habit and that the donor intended the certificate to be a gift at the time he signed it.[13]

In *Zehr v. Daykin*,[14] defendant's claim of a valid inter vivos gift failed for lack of donative intent and proper delivery. The deceased "donor" had purchased four certificates of deposit which he had orally requested the bank to place in his and defendant's names as joint tenants. Neither a signature card nor a deposit agreement was signed or delivered to the defendant. The certificates remained in the exclusive possession of the donor from time of purchase until his death and all interest was received by him. When he died the certificates were found in his private safety deposit box. In applying a well-settled rule, the court found it obvious that no actual or constructive delivery had occurred.[15] Citing an earlier Indiana Supreme Court decision,[16] the majority opinion indicated that the alleged gift failed for a more serious defect than lack of delivery. The cited case stated that merely depositing money in the name of the owner and another is not sufficient to show donative intent. The dissent implied that intent was shown by such action, and stated that when intent is clear, the rules concerning delivery should be liberally construed so as to give effect to that intent.[17]

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[12]For a discussion of the right to withdraw funds from a joint account during the lifetime of the cotenant, see Annot., 77 A.L.R. 799 (1932).

[13]There was no evidence of outstanding bills for which the $17,000 may have been needed. A nurse who cared for the donor in his last illness testified that he was very intelligent, that he handled his own business affairs up to the time of his death, and that he had said he was leaving almost everything to his daughter. 279 N.E.2d at 253.

[14]288 N.E.2d 174 (Ind. Ct. App. 1972).

[15]*See, e.g.*, Lewis v. Burke, 248 Ind. 297, 226 N.E.2d 332 (1967).

[16]Ogle v. Barker, 224 Ind. 489, 68 N.E.2d 550 (1946).

[17]288 N.E.2d at 177 (Staton, J., dissenting). For a thorough consideration of this area, see Annot., 43 A.L.R.3d 971, 1015 (1972).

XI. Secured Transactions and Creditors' Rights

*R. Bruce Townsend**

The last ten years have seen some important changes in the law governing those who furnish credit and those who obtain it, particularly when security is involved. Indiana has suffered through the enactment of both the Uniform Commercial Code[1] and the Uniform Consumer Credit Code[2] and has felt the impact of the Federal Truth in Lending Act.[3] Cases have just begun to deal with these new laws. Some important legislative changes lie just over the horizon, particularly in transactions involving real estate.[4] A brief review of recent Indiana case law in the field of secured transactions and creditors' rights reflects changes that have taken place and indicates judicial recognition of innovations in store for those who practice in this area of the law.

A. Disclosure Requirements

Attention must be called to the recent decision of the United States Supreme Court upholding the constitutionality of the Truth in Lending Act as applied to consumer credit, defined by regulations to include transactions in which either a credit charge is or may be imposed or which are payable in more than four install-

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[1]Ind. Code §§ 26-1-1-101 to -2-4-1 (1971) [hereinafter cited as UCC]. This Act became effective in Indiana on July 1, 1964.

[2]*Id.* §§ 24-4.5-1-101 to -6-203 [hereinafter cited as UCCC]. This Act became effective on October 1, 1971, but the provision for maximum charges applicable to revolving loan and charge accounts became effective upon passage, March 5, 1971.

[3]15 U.S.C. §§ 1601-13, 1631-41, 1661-65, 1671-77 (1970) (also referred to as the Consumer Credit Protection Act). The statute went into effect on July 1, 1969, and the provisions regulating garnishment became effective July 1, 1970. The basic rules relating to the Truth in Lending Act are included in Regulation Z issued by the Board of Governors of the Federal Reserve System. There have been a large number of subsequent interpretations.

[4]The National Conference of Commissioners on Uniform State Laws is drafting a Uniform Land Transactions Act which will cover matters involving most aspects of security transactions concerning real estate. A second Tentative Draft of this legislation was considered by the National Conference at its 1973 meeting. The Uniform Residential Landlord and Tenant Act has been considered by the 1973 Indiana General Assembly, but it did not come out of committee.

ments.[5] *Mourning v. Family Publications Service, Inc.*[6] held that the vendor of magazine subscriptions for five years payable in thirty installments violated the Act by failing to make required disclosures. The case pointed up the all-encompassing nature of the law and the tremendous responsibility incurred by those who grant consumer credit. Both country and city lawyers need copies of the Federal Reserve Regulations which implement the Truth in Lending Act,[7] and practically all persons who are engaged in the business of extending consumer cerdit are in constant need of legal assistance.

B. Usury

Prior to the adoption of the UCCC, except as provided by special statutes, it was generally believed that a charge in excess of eight percent per annum was usurious because the general statute so provided.[8] Cunning lawyers, however, had long ago hoodwinked the courts of other states and Indiana into neutralizing the language of the statute by various devices. One of these was the "time price differential" theory which allowed a seller of goods, services, or land to impose any charge for the credit—his time price—which he wished.[9] The Indiana Court of Appeals recently fell victim to one of the best hoodwinking jobs in *Standard Oil Co. v. Williams*[10] in which the court was induced to apply the doctrine in favor of the issuer of a credit card who was not a seller and apparently when no "time price" by a seller was involved.[11] Thankfully, the mathematical and intellectual impurity

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[5]Fed. Res. Bd. Reg. Z, 12 C.F.R. 226.2(k) (1973).

[6]411 U.S. 356 (1973).

[7]The regulation and interpretations along with appropriate tables may be obtained from the Federal Reserve Bank or the Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

[8]Ch. 24, § 4, [1879] Ind. Acts 43, *as amended* ch. 220, § 3, [1929] Ind. Acts 804 (repealed by Pub. L. No. 366, § 10(1), [1971] Ind. Acts 1675).

[9]The Indiana Supreme Court was hoodwinked into this construction in Borum v. Fouts, 15 Ind. 50 (1860), which recognized that a seller could have a cash price and a time price.

[10]288 N.E.2d 170 (Ind. Ct. App. 1972).

[11]The case involved the finance charge imposed by Standard Oil Company upon purchases from dealers (who apparently were not necessarily connected with Standard except as independent contractors) under credit cards issued by Standard to its customers. There was no showing that the dealers extended the credit.

of the time price differential theory and its extension to lender credit card transactions have been neutralized by the Truth in Lending Act[12] for disclosure purposes and by the UCCC[13] which limits the finance charge (now to one and one-half percent and more in some cases) on a consumer loan or on the cash price if a consumer credit sale is involved.

C. Vendor's Lien

When a vendor conveys real estate in exchange for a consideration to be performed by the purchaser, the vendor retains a law-created lien on the realty to secure the purchaser's executory obligation.[14] This lien does not exist in favor of the seller of goods, and a recent decision denies the lien to a transferor of securities—in this case, stock certificates.[15] Article 2 of the UCC gives the seller of goods a possessory lien,[16] and in certain cases he

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[12]Regulation Z requires disclosure of the "annual percentage rate," computed on the basis of the finance charge which must include "[i]nterest, *time price differential*, and any amount payable under a discount or other system of additional charges." Fed. Res. Bd. Reg. Z § 226.4(a)(1), 12 C.F.R. § 226.4(a)(1) (1973) (emphasis added).

[13]In the case of a consumer credit sale or consumer related sale, the seller is allowed to impose variously fixed maximum "credit service charges" which include any "time price differential" and range from 18% to 36%. IND. CODE § 24-4.5-2-109 (1971). Maximum "loan finance charges" upon consumer loans, regulated loans and supervised loans are fixed by provisions relating to loans, as distinguished from consumer credit sales or consumer related sales, and range from 10% to 36%. *See id.* § 24-4.5-3-109.

[14]*E.g.*, Old First Nat'l Bank & Trust Co. v. Scheuman, 214 Ind. 652, 13 N.E.2d 551 (1938). As a law-created lien, the security is fragile and subject to many special rules. *E.g.*, Cassidy v. Ward, 70 Ind. App. 550, 123 N.E. 724 (1919) (taking of a mortgage or other security waived lien without relation back). Unless the obligation of the purchaser is included within the deed, a bona fide purchaser from a vendee will cut off the rights of the vendor. *Compare* Hawes v. Chaillee, 129 Ind. 435, 28 N.E. 848 (1891), *with* Case v. Bumstead, 24 Ind. 429 (1863). The vendor may perfect his lien by filing suit to do so and filing notice of his claim in the lis pendens docket. Wilson v. Burgett, 131 Ind. 245, 27 N.E. 749 (1891).

[15]Johnson v. Jackson, 284 N.E.2d 530 (Ind. Ct. App. 1972). In this case the vendor sold stock to the purchaser and his wife with the husband only agreeing to pay the price. When the corporation was subjected to a receivership proceeding the court originally allowed the vendor what amounted to a set-off from proceeds of the receivership, but the court reversed its order upon the petition of the wife and allowed her to receive her undivided one-half of the proceeds. This decision was sustained upon appeal.

[16]*Cf.* UCC §§ 2-703(a), (b), -705 (relating to seller's right of stoppage in transit).

may avoid a sale when the buyer has obtained delivery.[17] Parallel provisions in Article 8 allow the seller to regain possession of securities obtained by wrongdoing, but nothing in the nature of a vendor's lien is created.[18]

D. The Deed in Consideration of Support

A significant geriatrics problem arises when older persons convey land to a relative upon the understanding that the grantee will furnish support or a home to the grantor in consideration for the conveyance. Many Indiana cases deal with deeds of this sort and find that the conveyance creates in the grantor either a right to enter for conditions broken in the event that support is not forthcoming or a lien upon the property to secure the performance promised by the grantee.[19] This kind of arrangement was presented to the court of appeals in *Brunner v. Terman*[20] in which the deed provided that "as part of the consideration for this Deed, Grantees do agree to take care of and assist . . . grantors in case they do need any aid during their respective lifetimes."[21] The court held this to be a covenant, not a condition subsequent in favor of the grantors. However, the court seemingly held that a mortgage of the grantees in the deed took priority over the interest of the grantors in support. If this was the holding of the court, the case appears to be in error. A covenant of support in the deed creates a lien which will take priority over any subsequent mortgage of the grantees.[22] However, Judge Lowdermilk's opinion also

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[17]Subject to the rights of bona fide purchasers, the seller may avoid a sale when the buyer obtains a voidable title. *Id.* § 2-403(1). *See also id.* §§ 2-702, -722.

[18]Subject to the rights of a bona fide purchaser, the seller may reclaim a security wrongfully obtained. UCCC § 8-315.

[19]A promise of support by the grantee is sufficient to create a vendor's lien in favor of the grantor to secure the consideration—*i.e.*, the duty of support. *E.g.*, Huffmond v. Bence, 128 Ind. 131, 27 N.E. 347 (1890). Language may create a condition subsequent in favor of the grantor who may elect to enforce his rights as a lien upon the property. Lowman v. Lowman, 105 Ind. App. 102, 12 N.E.2d 961 (1955).

[20]275 N.E.2d 553 (Ind. Ct. App. 1972).

[21]*Id.* at 555-56.

[22]Federal Land Bank v. Luckenbill, 213 Ind. 616, 621, 13 N.E.2d 531, 534 (1938) ("A conveyance in consideration of support of the grantor from the land conveyed is held to create a lien paramount to the rights of creditors of the grantee . . . ."); Glendening v. Federal Land Bank, 112 Ind. App. 162, 44 N.E.2d 251 (1942).

determined that the provision for support was inserted in the deed without authorization from the grantors and was of no effect for that reason.[23] The decision re-emphasizes the need for careful draftsmanship in the case of support conveyances.

E. Real Estate Recording Statutes

The aged Indiana recording statutes amazingly spawn little litigation.[24] One recent decision makes it clear that the State has no special rights under a conveyance or dedication which is not properly recorded. Bona fide purchasers take free of the State's claim except as to that portion of the highway which is in current use.[25] This imposes upon the State the burden of entering its real estate acquisitions on the record books—a concept which is not new in Indiana.[26]

F. Conditional Sales Contracts—Forfeiture

The rule for generations has been that the mortgagor's equity

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[23]*See* 275 N.E.2d 553, 565 (Ind. Ct. App. 1972). Improper insertion of the support provision should have been raised by a claim for reformation, but a formal pleading to this effect was not required under Indiana Rule of Trial Procedure 64(C). The court could have found the language of the support provision precatory or vague. *But cf.* Garard v. Yeager, 154 Ind. 253, 56 N.E. 237 (1900). In any event, the rights of the parties to support deeds remain subject to special equitable principles. *Cf.* Tibbetts v. Krall, 128 Ind. App. 215, 145 N.E.2d 577 (1957).

[24]*Cf.* IND. CODE §§ 32-1-2-16, -1-2-17, -1-2-31, -7-2-1 (1971). By and large these and other recording statutes have received a most sensible construction by Indiana courts which have been able to hear much better than they see. *E.g.*, Tuttle v. Churchman, 74 Ind. 311 (1881). *But cf.* Mishawaka St. Joseph Loan & Trust Co. v. Neu, 209 Ind. 433, 196 N.E. 85 (1935) (originating the "lazy banker" rule—holding that a purchaser's three day possession did not put a mortgagee banker on notice of the purchaser's rights).

[25]State v. Cinko, 292 N.E.2d 847 (Ind. Ct. App. 1973) (buyer protected although his deed provided "subject to rights of public in existing highways").

[26]The state claiming by eminent domain proceeding must start over again against a bona fide purchaser unless it first records its proceeding in the lis pendens records, takes control of the land, or records the conveying instrument. *Compare* State v. Anderson, 241 Ind. 184, 170 N.E.2d 812 (1960), *with* Cleveland, Cin., Chi. & St. L. Ry. v. Beck, 84 Ind. App. 380, 139 N.E. 705 (1923) (eminent domain by railway).

It is recognized that a general, unrecorded scheme restricting the use of land may be proved by parol and that purchaser of tracts within the scheme may take subject to the plan. Elliot v. Kelly, 121 Ind. App. 529, 98 N.E.2d 374 (1951) (en banc). A recent decision makes it clear that a purchaser without notice thereof takes free of the restrictions. Newell v. Standard Land Corp., 297 N.E.2d 842 (Ind. Ct. App. 1973) (constructive notice not inferred from facts as presented on motion for summary judgment).

of redemption may not be clogged—contracted away.[27] The same rule does not apply to the vendee in possession under a land contract even though the transaction is essentially a security device. Quite a number of Indiana decisions have allowed strict forfeiture under standard conditional sales contracts which permit the vendor to retake possession and treat prior payments as rent when the purchaser defaults.[28] The rule again has been recognized by a recent court of appeals decision.[29] One might foresee a quick end to the rule allowing strict forfeiture in land contract cases and even a reversal of this case, when it is heard on transfer to the supreme court, for several reasons. One stems from the analogy in personal property transactions in which the UCC eliminated distinctions between the chattel mortgage and the conditional sales contract.[30] Another lies in the Indiana rule denying the vendor forfeiture rights when the evidence establishes that he has accepted late payments. The right to forfeiture is denied until the purchaser is given notice to bring himself current and is allowed a reasonable time to do so,[31] and this rule has been recently applied in favor of a defaulting tenant.[32] By this means, the harsh consequences of forfeiture usually have been avoided by Indiana appellate decisions. Finally, forfeiture has always been a hideous thing in equity, which granted relief from law actions,[33] but in recent times unconscionability, which usually entails some kind of forfeiture provision, has

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[27]*E.g.*, Federal Land Bank v. Schleeter, 208 Ind. 9, 194 N.E. 628 (1934) (invalidating a mortgage provision giving up the statutory right of redemption as then, and now in different form, allowed by Indiana law).

[28]*E.g.*, J.F. Cantwell Co. v. Harrison, 95 Ind. App. 293, 180 N.E. 482 (1932). *But cf.* Gilbreth v. Grewell, 13 Ind. 484 (1859) (upon forfeiture, vendor required to account for payments above his damages).

[29]Skendzel v. Marshall, 289 N.E.2d 768 (Ind. Ct. App. 1972). In this case the purchaser had paid $21,000 on a $36,000 contract, and the court upheld a strict forfeiture. The case probably sets some kind of record for strict forfeiture. Another recent decision permitted forfeiture plus damages. Lacy v. White, 288 N.E.2d 178 (Ind. Ct. App. 1972).

[30]UCC § 9-102(2). Conditional sales of goods were separately dealt with by the Uniform Conditional Sales Act (repealed by the UCC) which allowed limited forfeiture. Law prior thereto allowed strict forfeiture against a defaulting conditional buyer. *Cf.* International Harvester Co. v. Lockwood, 205 Ind. 36, 185 N.E. 637 (1933).

[31]*E.g.*, Carr v. Troutmen, 125 Ind. App. 151, 123 N.E.2d 243 (1954) (en banc).

[32]Rembold v. Bonfield, 293 N.E.2d 210 (Ind. Ct. App. 1973).

[33]*E.g.*, Walter v. Bement, 50 Ind. App. 645, 94 N.E. 339 (1912).

become an accepted means for eliminating unreasonable provisions in "pig" contracts of all sorts.[34]

G. *Assignment of Mortgagor's Interest; Merger*

Because much property is mortgaged or impressed with a security interest, many difficulties may be encountered when the mortgagor or lien debtor conveys his interest in the property. The sale may be subject to the mortgage;[35] the transferee may assume the mortgage;[36] the lienholder may accept the buyer's obligation by way of novation;[37] or the purchaser may refinance and pay off the lien. One aspect of this problem was recently presented to the court of appeals in *Cook v. American States Insurance Co.*[38] under a fact situation that stretches the imagination of even a law professor. In that case, M executed a mortgage on improved real estate and a note to E loan association for about $6,000. Later M sold the property to M2 who assumed the mortgage and insured it with I insurance company. Subsequently the building on the property burned, I paid off E and took an assignment of the mortgage from E; I then took a deed from M2 and, apparently, released M2 from his obligation.[39] The court correctly held that when M2 assumed the mortgage he became a surety and M became a principal on the obligation. Hence a binding release or agreement between M2 (the surety) and I (the creditor or mortgagee) discharged M who was the primary party under established principles of suretyship law.

One interesting sidelight to the case was considered—whether

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[34]*E.g.*, Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971).

[35]Mutual Benefit Life Ins. Co. v. Lindley, 97 Ind. App. 575, 183 N.E. 127 (1933) (holding that the property is primarily liable for the debt, the transferor remaining primarily liable for any deficiency and taking the position of a surety to the extent of the value of the property).

[36]Usually this form of transaction is evidenced in the terms of the deed which binds the grantee through his acceptance. However, parol evidence is admissible to show that the transferee assumed the obligation. Thus the mortgagee will recover on a theory of third party creditor beneficiary contract. Hays v. Peck, 107 Ind. 389, 8 N.E. 274 (1886).

[37]The mortgagor and his transferee cannot bind the lienholder, who must be a contracting party to the arrangement. Navin v. New Colonial Hotel, 228 Ind. 128, 90 N.E.2d 128 (1950).

[38]275 N.E.2d 832 (Ind. Ct. App. 1971).

[39]The facts of the case are specially strange since the assignment to the insurer redounded to the disadvantage of the insured. One might guess that the insurer suspected arson or some wrongdoing. Certainly the insurance company had no rights arising by way of subrogation.

or not the acquisition of the mortgagor's interest by the mortgagee resulted in a merger extinguishing both the debt and the mortgage. Ordinarily merger results in such a case, but equity will prevent merger when it operates against the intent of the parties or when it would unfairly prejudice the rights of the transferee.[40] Assuming that merger took place in this case, the effect would be to discharge the mortgage. But merger is a property concept and does not necessarily dissolve the debt.[41] Hence the surety would have been discharged under principles of suretyship law only to the extent of the value of the property securing the debt (which was of diminished value because of the fire), but not necessarily upon the whole debt.[42] The case seemingly did not reach this point because the court found a binding agreement between the creditor and principal releasing M2, the principal, upon his debt.

H. Assignment of Vendor's Interest under Land Contract

An interesting problem arises when V contracts to sell land to P and before consummation of the transaction V wishes to assign his interest to V2. How should this be done? One thing is very clear. V should not attempt to transfer his interest by means of deed. If he does so, he may commit anticipatory repudiation and allow P to escape his liabilities under the contract.[43] One further difficulty was highlighted by a recent decision of the court of appeals.[44] There the vendor, V, who had given an option to purchase to P1, subsequently deeded the property to V2. The court held that a subsequent quitclaim conveyance by V to P was ineffective to transfer title, since V no longer had any interest to convey, or, at least under the facts of the case as presented on appeal, P failed to show that the transfer was made in fulfillment of the option.

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[40]*See* Coburn v. Stephens, 137 Ind. 683, 36 N.E. 132 (1893). *Accord,* United States v. Joe Murray's Point Lookout, 342 F. Supp. 92 (S.D.N.Y. 1972).

[41]Thus a mortgagee may release the mortgage without releasing the debt, and it is doubtful that a release of the mortgage standing alone will establish that the debt has been paid. *Cf.* Holland v. Johnson, 51 Ind. 346 (1875) (oral release upheld by dissenting judge who wrote for the majority).

[42]A creditor's releasing collateral of the principal will discharge a non-assenting surety only to the extent of the value of the collateral. Sterne v. Bank of Vincennes, 79 Ind. 549 (1881). *Accord,* UCC § 3-606(1)(b).

[43]Sabaugh v. Schrieber, 87 Ind. App. 588, 162 N.E. 248 (1928).

[44]Coons v. Baird, 265 N.E.2d 727 (Ind. Ct. App. 1970).

Upon this point the case was clearly wrong[45] inasmuch as V2 was informed of and took subject to P's rights, with only a claim to payment of any sums owing under the contract as of the time P was informed of V2's interest. Instead the court awarded title to V2 and left P to pursue his rights against V, a nonparty.

I. Open-Ended Credit Transactions

A lender may take security and provide that the security interest will cover future advances. Such arrangements are valid and recognized by the UCC. In *Hancock County Bank v. American Fletcher National Bank & Trust Co.*,[46] the debtor pledged coins as security for a loan. The pledge agreement included an open-end provision to the effect that the pledge should cover all present and future obligations owing to the secured party bank. Two additional loans were subsequently made when the debtor died. The court upheld the validity of the arrangement under UCC section 9-204(5),[47] but sustained the decision of the lower court holding the bank to be unsecured as to the two subsequent loans made after the execution of the pledge agreement. An officer of the secured party had stated, in response to an inquiry, that the two notes representing the subsequent loans "are on an unsecured basis."[48] This was held to constitute an admission sufficient to show that the later loans were not intended to be secured. A good guess is that the bank officer was unfamiliar with the open-end provision commonly included in pledge agreements, a point of interest to lawyers who have occasion to advise bankers.

It should be pointed out that future advances made on personal property security under the UCC probably take a higher, or safer, priority over intervening secured parties than in the case

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[45]Railroadmen's Bldg. & Sav. Ass'n v. Rifner, 88 Ind. App. 580, 163 N.E. 236 (1929); *cf.* UCC § 9-318(3); IND. CODE § 37-7-1-9 (1971). A recent decision dealt with the obligation of an account debtor to make payment to an assignee of an account. It held that the account debtor must pay the assignee who complies with UCC § 9-318(3) and that payment to the assignor is at the account debtor's risk. Ertel v. Radio Corp. of America, 297 N.E.2d 446 (Ind. Ct. App. 1973).

[46]276 N.E.2d 580 (Ind. Ct. App. 1972).

[47]

> Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.

Id. at 581.

[48]*Id.*

of real property security. Under the UCC, priorities basically are determined by the order of perfection.[49] In real estate transactions, an open-end advance will be deferred to an intervening mortgage unless the advance is mandatory under an agreement with the mortgagor or unless it is made without actual, as distinguished from constructive, notice of the intervening interest.[50]

J. Security Interest in Inventory

Probably the most significant innovation of the UCC was the validation of security interests upon inventory, accounts, contract rights, and other types of personal property assets representing the revolving assets of a business. Three recent decisions have given integrity to that policy and upheld security interests in inventory against competing interests. In *National Bank & Trust Co. v. Moody Ford, Inc.*,[51] a bank, floor planning an automobile dealer, had perfected its security interest by filing a financing statement with the Secretary of State. The security agreement covered all inventory and equipment then owned or acquired thereafter. The court granted the bank priority as to after-acquired new automobiles as against a shareholder-creditor of the dealer who had caused his purchase money security interest to be noted upon the certificates of origin of three new cars. The court pointed out that the only way in which the perfected security interest in inventory, whether consisting of motor vehicles or other property, may be defeated is for the holder of purchase money security in inventory to both perfect and notify the prior secured party of the purchase money security interest and his acquisition of a purchase money security interest in the debtor's inventory described

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[49]UCC § 9-312(5). This means that if SP1 claims under an open-end security agreement and SP1 first perfects, and SP2 claims a later perfected advance, SP1 ordinarily will take priority even though SP1 knew of SP2's security interest upon the same property, and still later SP1 makes a future interest at the time of the advance. *Cf.* James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972) (recognizing that SP1 protected under a filed financing statement as to future advances even though security agreement executed after SP2's interest claimed or perfected unless SP2 entitled to a super-priority under other provisions of the Code). *But cf. In re* Hagler, 10 UCC REP. SERV. 1285 (E.D. Tenn. 1972) (when SP1 underfiled financing statement and security agreement paid in full, subsequent security agreement taken after SP2 had taken security agreement on same property deferred to SP2).

[50]*See generally In re* Woodruff, 272 F.2d 696 (7th Cir. 1959) (discussing Indiana law on the subject).

[51]273 N.E.2d 757 (Ind. Ct. App. 1971).

by item or type before the debtor acquires possession.[52] In this case, the evidence failed to show that the purchase money secured party had either perfected or given the proper notice prior to the time the debtor acquired possession.[53] It should be noted that had he complied with the statute, the purchase money secured party would have been allowed a super-type of priority under the express provisions of the UCC.

In a much more difficult case, the court of appeals in *First National Bank v. Smoker*[54] upheld the security interest of a banker in the inventory of the debtor who was a meat processor. The security agreement covered after-acquired inventory and was properly filed with the Secretary of State. A farmer delivered $17,500 worth of cattle to the processor and expected payment when the beef was graded on the following day. When the banker repossessed the debtor's inventory which included the farmer's cattle, the farmer was not paid. In an action for conversion, the farmer claimed in essence a sale conditioned upon cash payment, a claim based upon custom and usage. The court correctly held that the farmer had two principal avenues open to him. He could claim that title had not passed, but, if this were done, he was required to show a security interest meeting the requirements of Article 9.[55] The farmer's claim was based upon custom and usage and did not meet the requirement of a security agreement,[56] and even if it did, he did not qualify for the super-priority accorded a purchase money security interest as in the *Moody* case discussed above. The farmer in any event could have reclaimed the goods from the processor under UCC section 2-702 because of the processor's insolvency—provided that he made demand for their

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[52]The court quoted UCC § 9-312(3).

[53]Although a security interest in motor vehicles ordinarily is perfected upon the certificate of title by a public official, this method of perfection is not recognized as to motor vehicles which are inventory held for sale. *Id.* §§ 9-302(3), (4). Note that if the inventory is held for lease, notation upon the certificate is a proper method of perfection and filing is not.

[54]286 N.E.2d 203 (Ind. Ct. App. 1972).

[55]The language of the Code is:

> Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. . . .

UCC § 2-401(1). *See also id.* §§ 1-201(37), 9-113.

[56]A written security agreement signed by the debtor describing the collateral is required when the secured party does not retain possession of the goods. *Id.* §§ 9-113, -203. There was no such agreement in this case.

return within ten days after their receipt.[57] Compliance with this provision was not shown, but had the farmer made proper demand he might have been defeated by the bank which, under the present status of the law, could qualify as a good faith purchaser for value and defeat the claim.[58] This case makes it seemingly tough on farmers, but a contrary result would undo a lot of certainty that the Code brings to inventory financing—certainty which in the long run will redound to the farmer's advantage. The case leaves no practical solution for the farmer to protect himself when the buyer does not concurrently pay in cash or its equivalent.[59] The farmer thus is faced with insisting upon prepayment or cash, taking the risk of inventory financing, and in all events keeping informed as to his rights.

One other problem has recently been resolved concerning the financing of accounts. The Code allows a debtor to assign his accounts, and, although the assignee's rights may be perfected by filing, the account debtor may safely pay the debtor until he receives notification from the assignee or secured party.[60] The Code also allows the latter to notify the account debtor to pay him

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[57]

> Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery, the ten days limitation does not apply. Except as provided in this subsection, the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

Id. § 2-702(2).

[58]A good faith purchaser for value will defeat the seller's right of reclamation under section 2-702. *Id.* §§ 2-403(1), 2-702(3). Case law holds that a secured party holding under a security agreement covering after-acquired property becomes a purchaser for value as to the after-acquired property and the secured party will be protected if he qualifies as a good faith purchaser. *E.g.*, *In re* Hayward Woolen Co., 3 UCC REP. SERV. 1107 (D. Mass. 1967); Stumbo v. Paul B. Hult Lumber Co., 251 Ore. 20, 444 P.2d 564 (1968). The prior indebtedness for which the collateral is taken as security is value. UCC § 1-201(44)(b).

[59]Legislation requires livestock dealers to be licensed and furnish a bond to protect sellers. Meat processors are included. IND. CODE §§ 15-2-12-4(f), -9 (1971). One argument that might have been plausible in this case is that the buyer (the meat processor) did not obtain delivery or possession but merely a custody of the goods. *See* UCC §§ 2-501(1), -511(1).

[60]UCC § 9-318(3).

and therefore collect directly.[61] In a recent decision,[62] the assignee notified the account debtor of the assignment, required that payment be made to the assignee, and identified the rights assigned. When the account debtor ignored the notice and paid the debtor (assignor) who defaulted upon his obligation to the assignee, the assignee was allowed to recover from the assignor. This decision emphasizes the responsibility of account debtors to honor the claims of assignees, but only upon proper receipt of notification. It also serves as a reminder to an assignee that if he wishes payment to be made directly to him, he must comply strictly with Code provisions as was done in this case.[63]

K. Creditor and Debtor Rights—Collection Devices

It is a fair supposition that a creditor cannot "beat up" the debtor as a collection tactic, and by the same token, a debtor is not allowed to use such means to discourage the creditor from collecting.[64] Several Indiana decisions have dealt with some lesser evils. To discourage an employee from claiming workmen's compensation, the employer threatened discharge and, when the claim was made, fired the employee. In a landmark case, *Frampton v. Central Indiana Gas Co.*,[65] the Indiana Supreme Court found this to be a tort for which the employee could recover actual and punitive damages. Hopefully, the decision will also set a new standard of decency for judging the conduct of debtors and creditors in the use of extralegal efforts to collect or defend.[66] The appellate court, however,

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[61]Only when so agreed or upon default by the debt. *Id.* § 9-502(1).

[62]Ertel v. Radio Corp. of America, 297 N.E.2d 446 (Ind. Ct. App. 1973). In this case a surety of the debtor paid the assignee and the court also held that the surety was subrogated to all the assignee's rights.

[63]Similar statutory provisions protect debtors in consumer credit transactions as against assignees. UCCC §§ 2-412, 3-406. These provisions are IND. CODE §§ 24-4.5-2-412, -3-406 (1971).

[64]This was substantiated by Kelsbeck v. State, 272 N.E.2d 607 (Ind. 1971) which upheld the conviction of the representative of a finance company for malicious trespass when the agent removed a mobile home upon which it held a security interest without the consent of the landlord who had a claim for rent against the debtor.

[65]297 N.E.2d 425 (Ind. 1973), *rev'g* 287 N.E.2d 902 (Ind. Ct. App. 1972). The wrong here was labelled as "retaliatory discharge" and parallels cases allowing relief against tenants the subject of "retaliatory eviction" when they complained to authorities of housing violations. *See* decisions cited *id.* at 428 n.4.

[66]Hopefully, the case may furnish a basis for overruling Patton v. Jacobs, 118 Ind. App. 338, 78 N.E.2d 789 (1948), which allowed the collecting creditor to interfere with the debtor's employment.

has held that the wrongful refusal of an insurance company to pay a claim is not the basis for recovering damages for emotional suffering.[67]

L. Mechanics' Liens

Claims of contractors, subcontractors, materialmen, and laborers to liens under the Indiana mechanics' lien statute continue to be litigated upon the appellate level. It has been determined that failure of a contractor to obtain a building permit required by law when it would have been granted had the application been pursued is not grounds for denying a contractor recovery upon his contract and the right to a mechanics' lien.[68] Although the lien claimant must file a sworn statement of a notice of intent to hold a mechanics' lien,[69] omission of his name from the jurat attached to the notice of lien which named and was signed by the claimant did not defeat the notice of lien.[70] Most of the current litigation involves the resolution of disputed facts including questions of the timeliness of the filing of the lien,[71] the substantial performance of the lien claimant,[72] and the cost of extras.[73] A lien may be

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[67]Meridian Mutual Ins. Co. v. McMullen, 282 N.E.2d 558 (Ind. Ct. App. 1972). The court was careful to point out that there was no evidence of a malicious failure to pay the claim, and so the insurance company was not liable for punitive damages. A number of jurisdictions, including Indiana, recognize liability for malicious refusal to pay a claim. *See generally* Annot., 47 A.L.R.3d 314, 318 (1973). *See also* Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972) (allowing compensatory damages for malicious refusal to pay). A creditor may be held for malicious prosecution of civil litigation. Why should not the same rule be applied to a debtor submitting a malicious defense? *See* Slee v. Simpson, 91 Colo. 461, 15 P.2d 1084 (1932) (allowing recovery for malicious counterclaim filed without probable cause).

[68]Drost v. Professional Bldg. Serv. Corp., 286 N.E.2d 846 (Ind. Ct. App. 1972). A nonregistered architect cannot claim a lien for plans furnished to the owner. Kolan v. Culveyhouse, 144 Ind. App. 249, 245 N.E.2d 683 (1969).

[69]IND. CODE § 32-8-3-3 (1971) (requiring "sworn statement" in duplicate to be filed within 60 days after performance).

[70]Whitfield v. Greater South Bend Housing Corp., 276 N.E.2d 188 (Ind. Ct. App. 1972) (distinguishing case in which jurat was not signed by notary).

[71]Walker v. Statzer, 284 N.E.2d 127 (Ind. Ct. App. 1972).

[72]*Id.* In this case the court allowed the contractor to testify as to the value of his work, but held that photographs showing inferior work were not conclusive.

[73]Drost v. Professional Bldg. Serv. Corp., 286 N.E.2d 846 (Ind. Ct. App. 1972) (holding also that the fact of the owner's occupancy after completion shows substantial performance).

asserted against funds remaining in the owners' hands,[74] and it has been held that a second subcontractor of a first subcontractor may assert the lien although the first subcontractor has been paid by the contractor.[75]

Owners of single and double dwellings occupied (or to be occupied in the case of new construction) as a home receive special protection under the Indiana mechanics' lien statute. Unless a subcontractor gives such an "owner" written notice of his intent to hold a lien within five days (fourteen days in the case of new construction) after the first work is commenced or the first materials delivered, no lien can be claimed by him.[76] Suppose that an owner deeds his property to the contractor with an agreement that the contractor will reconvey it to him upon completion of a new home. Must a subcontractor give notice of his intent to claim a lien as required by the statute? Is the contractor the "owner"? *William F. Steck Co. v. Springfield*[77] held that under the arrangement the owner remained as "owner" of a dwelling to be occupied as a home and within the statute requiring notice. The court ingeniously determined that the transaction constituted an equitable mortgage under established principles allowing the grantor under an absolute deed to show that the transaction was a mortgage.[78] It should be noted that the deed to the contractor had not been executed until after work had been commenced by the subcontractor claiming the lien, but had it been recorded prior to that time some additional difficulty would have been encountered because of lack of notice.[79]

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[74]The lien granted here is upon funds held by the owner before payment to the claimant's "employer" as distinguished from the lien upon the land. *See* IND. CODE § 32-8-3-9 (1971).

[75]This was an important point settled by Indianapolis Power & Light Co. v. Southeastern Supply Co., 146 Ind. App. 554, 257 N.E.2d 722 (1970), and worth mentioning here.

[76]IND. CODE § 32-8-3-1 (1971).

[77]281 N.E.2d 530 (Ind. Ct. App. 1972).

[78]It has long been established that an outright deed may be a mortgage when the grantee agrees to reconvey or other circumstances indicate that the transaction is a security device. *E.g.*, Burcham v. Singer, 277 N.E.2d 814 (Ind. Ct. App. 1972).

[79]Either upon a theory of estoppel or upon the theory that the holder of a mechanics' lien may qualify as a bona fide purchaser subject to protection under the recording laws, it can be argued that an "owner" claiming under an unperfected title has no rights to the notice provided by statute. IND. CODE § 32-8-3-1 (1971). *Cf.* Metropolitan Cas. Ins. Co. v. S.J. Peabody Lumber Co., 99 Ind. App. 307, 192 N.E. 323 (1934).

A properly perfected mechanics' lien is barred unless foreclosure is commenced within one year after notice of the lien was filed or from the time credit given to the claimant expired.[80] It has been held that a suit to foreclose a lien was not commenced until the filing of the complaint and summons was issued to the sheriff.[81] Under Trial Rule 3, however, the action is commenced simply by filing of the complaint, and summons in all probability need not issue.[82] This severe time restriction for bringing foreclosure of mechanics' liens has another important consequence reiterated in *Mitchels Plumbing & Heating Co. v. Whitcomb & Keller Mortgage Co.*[83] There suit was brought within the proper time, but a junior lienholder of record was not made a party. The court held that because of the failure to make him a party within the year, priority was lost and the junior lienholder held a first right to proceeds on foreclosure sale.[84]

M. Creditors' Remedies—Proceedings Supplemental to Execution

Some very important issues relating to the enforcement of judgments in proceedings supplemental to execution have been resolved. Facing a number of issues raised by a reluctant and stubborn ex-husband in regard to alimony payments, the court of appeals in *McCarthy v. McCarthy*[85] held that as the principal judgment defendant, he was not entitled to a jury trial in proceedings supplemental to execution,[86] that the court rendering judgment in the original action had venue in enforcement of the judgment despite the general venue statutes or the venue provisions of the

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[80]IND. CODE §§ 32-8-3-6, -7-1, -7-2, -7-4 (1971).

[81]Valley View Dev. Corp. v. Cheugh & Schlegal, Inc., 280 N.E.2d 319 (Ind. Ct. App. 1972). The court held that the Indiana Rules of Trial Procedure, effective on January 1, 1970, were not applicable.

[82]Trial Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court . . . ."

[83]289 N.E.2d 138 (Ind. Ct. App. 1972). It seems that the court also deferred the mechanics' lienholder to a judgment lien acquired after foreclosure proceedings were commenced. This appears to have been upon the ground that the court in the foreclosure action did not enter a judgment of foreclosure and sale, but only gave judgment upon the indebtedness.

[84]Had a sale been held the purchaser thereat would have taken title subject to the rights of the junior lienholder which would then have a first priority. Stoermer v. People's Sav. Bank, 152 Ind. 104, 52 N.E. 606 (1899).

[85]297 N.E.2d 441 (Ind. Ct. App. 1973).

[86]The court recognized, however, that a garnishee named as party in proceedings supplemental may claim a jury trial upon legal issues applicable to him alone. McMahan v. Works, 72 Ind. 19 (1880).

proceedings supplemental statutes,[87] and that the fixing of a hearing in proceedings supplemental less than twenty days after service, as required by Trial Rule 69(D), was corrected by postponement of the hearing to a proper time. The court tacitly recognized that the change of venue provisions applied to proceedings supplemental to execution and, most significantly, indicated that a new practice which allows proceedings to be initiated by motion in the court where judgment was rendered does not deny the judgment plaintiff the right to initiate the proceedings as a separate action in other courts.[88] This is consistent with the idea that the remedy granted through proceedings supplemental is an equitable concept which allows the judgment creditor broad scope in pursuing assets of the debtor—the person usually who is at serious fault in not paying the judgment or making his assets readily available for that purpose. Accordingly, *Tipton v. Flack*[89] recognized that the judgment creditor could bring successive supplemental proceedings until his judgment was satisfied and that a former order requiring the defendant to pay into court a percentage of his wages did not bar a later proceeding naming the debtor's employer or garnishee. The court refused to hold that the first order was res judicata since there was no showing that the same wages were involved or that the employer was a party to the first proceeding. There is no reason that an in personam order directing the judgment debtor to turn over assets should bar a later proceeding against him and a garnishee to reach the same property if he fails to comply with the first order, and the case properly indicated that, although appealable,[90] an order in garnishment is part of a continuing process designed to assure enforcement of the judgment.[91]

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[87]The proceedings supplemental statutes contain specific venue provisions. *See* IND. CODE §§ 34-1-44-1, -2 (1971) (fixing venue at the judgment debtor's residence). The venue requirement of the new rules greatly expands the venue opportunities in such cases. IND. R. TR. P. 75.

[88]If an independent action is initiated (as the court indicated would be allowed) the plaintiff's choice of venue is governed by Trial Rule 75.

[89]271 N.E.2d 185 (Ind. Ct. App. 1971).

[90]The court held the order in proceedings supplemental to be appealable as a final judgment.

[91]

> Where the first order is not closed or abandoned, it may be consolidated with proceedings under a new order for examination of the judgment-debtor.

271 N.E.2d at 190.

One very important substantive issue related to the proceedings supplemental remedy was posed by a case in which a liability insurer tortiously refused to accept settlement of a claim within policy limits. Later a judgment was rendered against the insured in excess of those limits. It was recognized that the insured had a good claim against the insurer in tort or for breach of the insurer's contract to defend.[92] Does the judgment creditor have any means of reaching this asset of the insured? The answer seems to be very clear that this is an asset subject to garnishment in proceedings supplemental.[93] However, in *Bennett v. Slater,*[94] the court of appeals held that the judgment plaintiff had no standing to bring a direct action against the liability insurer in which the judgment debtor was named a party defendant. Clearly this should have been construed to be a supplemental proceeding initiated by separate action as allowed by *McCarthy v. McCarthy,*[95] even without labels identifying the suit as a proceeding supplemental to execution.[96] The decision is one of many which make a strong case for some type of no-fault program although it also furnishes little reason to anticipate that the insurance industry will apply itself generously and responsibly to the administration of no-fault insurance.[97]

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[92]The insured has a claim against the insurer if he can establish fault on the part of the insured. Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406 (7th Cir. 1965), *cited with approval in* Bennett v. Slater, 289 N.E.2d 144 (Ind. Ct. App. 1972).

[93]It is clear that almost everywhere such a claim of the insured is assignable and is subject to creditor process. *E.g.*, Whitehead v. Leuven, 347 F. Supp. 505 (D. Idaho 1972). The asset will pass to the insured's estate, even though it is insolvent. Maguire v. Allstate Ins. Co., 341 F. Supp. 866 (D. Del. 1972). The claim will pass to the insured's trustee in bankruptcy. Young v. American Cas. Co., 416 F.2d 906 (2d Cir. 1969), *petition for cert. dismissed,* 396 U.S. 997 (1970) (recognizing a different rule when insured insolvent before liability incurred since no damage would have been sustained); Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406 (7th Cir. 1965) (applying Indiana law). A claim for negligent injury to the debtor's property is assignable and is available to his creditors. *E.g.*, Annot., 66 A.L.R.2d 1217, 1221 (1959).

[94]Bennett v. Slater, 289 N.E.2d 144 (Ind. Ct. App. 1972).

[95]297 N.E.2d 441 (Ind. Ct. App. 1973).

[96]*Cf.* Rowe v. United States Fidelity & Guar. Co., 421 F.2d 937 (4th Cir. 1970) (the court allowed an amendment to the judgment creditor's complaint showing an assignment of the insured's claim to him).

[97]It seems that the only effect of the case is delay. The judgment creditor may still bring proceedings supplemental and name the insurer as garnishee. *Compare* IND. CODE § 34-1-2-8 (1971) *with* Allstate Ins. Co. v. Mor-

A problem causing some difficulty in the trial courts concerns the amount of wages subject to garnishment. It is made clear by section 5-105 of the UCCC that the maximum amount of weekly wages subject to garnishment under that law, *i.e.*, twenty-five percent of disposable earnings above thirty times the minimum wage, shall be subject to garnishment notwithstanding any exemption or other law.[98] A recent decision[99] avoided settling the matter by finding that a debtor claiming ninety percent of amounts above thirty times the minimum wage as exempt failed to assert his exemption in the proceedings below, although this is not required either by the UCCC or the proceedings supplemental statute.[100]

N. Attachment

When a debtor is a nonresident or fraudulently conceals himself or similarly conceals or disposes of his property, a creditor may cause his property to be attached or, if it is held or owed by a third person, include the latter by attachment and garnishment.[101] In this way he may obtain a lien upon the debtor's property by filing an affidavit and bond, without the necessity for any hearing.

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rison, 146 Ind. App. 497, 256 N.E.2d 918 (1970) (liability insurer subject to garnishment in proceedings supplemental).

[98]IND. CODE § 24-4.5-5-105(2) (1971) provides in part:

> Notwithstanding any exemption or other law, the maximum part of the aggregate disposable earnings of an individual subject to garnishment under this section shall be subject to garnishment except this provision shall not apply to any order of any court for the support of any person. . . .

[99]Mimms v. Commercial Credit Corp., 297 N.E.2d 892 (Ind. Ct. App. 1973).

[100]Behind the problem of exemptions is the Consumer Protection Credit Act, still applicable to Indiana, which provides that not more of the debtor's aggregate weekly wage than the lesser of either (1) 25% of his disposable weekly earnings or (2) 30 times the minimum wage may be subject to garnishment. The Act further provides that "[n]o court of the United States or any State may make, execute, or enforce any order or process in violation of this section." 15 U.S.C. § 1673(c) (1970). It is possible that this imposes a jurisdictional limitation upon the power of a court to exceed this authorization. A similar provision is included in UCCC § 5-105. IND. CODE § 24-4.5-5-105(c) (1971). The proceedings supplemental statute expressly provides that only 10% of income and profits are subject to the lien of proceedings supplemental and this provision is not a part of the general exemption laws. *See id.* § 34-1-44-7. This statute was not considered by the court.

[101]The grounds for attachment will be found in IND. CODE § 34-1-11-1 (1971) and Indiana Trial Rule 64(B), which greatly expands the types of assets subject to attachment.

Because of the lack of provision for hearing before attachment of the property, there may be some question as to whether the statute is constitutional, under the recent United States Supreme Court decision of *Fuentes v. Shevin*,[102] which struck down statutes permitting replevin before hearing. However, it is a fair bet that the Indiana statute meets the constitutional requirements of that case.[103] An excellent lecture on the use of attachment or attachment and garnishment against Indiana property of nonresidents will be found in *Transcontinental Credit Corp. v. Simkin*,[104] in which the court upheld a personal judgment to the extent of property attached at the threshold of the lawsuit against a nonresident defendant.[105] Service in that case was procured by publication, but creditors should be advised that under the doctrine of *Mullane v. Central Hanover Bank & Trust Co.*,[106] service calculated to give the defendant actual notice is required unless it is not reasonably possible.

O. Fraudulent Conveyances

A debtor may not give his property away and defeat his creditors. It generally is taught in law school that such a transfer may be avoided by an existing creditor if it involved property subject to creditor process, was made without a fair consideration, and left the debtor insolvent. Neither the Uniform Fraudulent Conveyance Act[107] nor the Bankruptcy Act[108] requires an intent to defraud creditors, but the established Indiana rule which allows a fraudulent conveyance to be avoided only when made with intent to defraud creditors[109] was again reaffirmed in *Kourlias v. Haw-*

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[102]407 U.S. 67 (1972). This case held unconstitutional replevin statutes in Florida and Pennsylvania similar to the then-existing statute in Indiana.

[103]Grounds for attachment required by the Indiana law seemingly meet the requirements of the extraordinary situations justifying the delay in granting a hearing. *See id.* at 90-91.

[104]277 N.E.2d 374 (Ind. Ct. App. 1972).

[105]Wages, even those of a nonresident, are not subject to attachment garnishment—*i.e.*, before judgment. *See* IND. R. TR. P. 64(B)(2).

[106]339 U.S. 306 (1950). In the *Simkin* case the defendant appeared in the case and challenged only the jurisdiction over the subject matter.

[107]UNIFORM FRAUDULENT CONVEYANCE ACT § 3.

[108]Bankruptcy Act § 67d, 11 U.S.C. § 107 (1970). This provision of the Act applies to transfers made within one year of the filing of the petition.

[109]Statute makes intent a requirement and a question of fact. IND. CODE §§ 32-2-1-14, -15 (1971). Intent is presumed in the case of a resulting trust situation. *Id.* § 30-1-9-7.

kins.[110] There the debtor remarried his former wife, and, pursuant to an antenuptial agreement binding both parties, conveyed his real estate to himself and his wife as tenants by the entireties and thus took it out of the reach of his individual creditors.[111] The court affirmed a judgment upholding the transfer on the somewhat incredible ground that the evidence showed the conveyance to have been made for the purpose of restoring marital harmony and thus imputed a pure state of mind to the debtor-husband who escaped the plaintiff-creditor with a judgment of $13,000. A little more research would have found sounder and more convincing grounds—Indiana case law holding that marriage is a fair consideration.[112]

The subject of fraudulent conveyances should not be left without a brief mention of a not-so-recent, but well reasoned casebook-type case allowing the creditor to obtain a preliminary injunction against a not yet consummated, but threatened, fraudulent transfer.[113]

P. Receiverships

The receivership as a means of enforcing creditors' rights continues to be regarded as an extraordinary remedy hedged with strict limitations. A complaint seeking the appointment of a receiver without notice must strictly show the need for equitable relief and be buttressed with affidavits establishing the facts.[114]

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[110]287 N.E.2d 764 (Ind. Ct. App. 1972).

[111]*See generally* Sharpe v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911) (recognizing that entireties assets could be reached by creditors holding a joint obligation of husband and wife). Transfer of individual property to the spouses as tenants by the entireties is a fraudulent conveyance as against the transferor's creditors—providing that the elements of a fraudulent transaction are established. Lewis v. Stanley, 148 Ind. 351, 45 N.E. 693 (1897). But a transfer of entireties property to one of the spouses is not a fraudulent conveyance on the part of the other because the property is not subject to creditor process; for that reason a transfer to a third party also is not vulnerable. *E.g.*, C.I.T. Corp. v. Flint, 333 Pa. 350, 5 A.2d 126 (1939); *cf.*, Stamper v. Stamper, 227 Ind. 15, 83 N.E.2d 184 (1949) (transfer of exempt property).

[112]Marmon v. White, 151 Ind. 445, 51 N.E. 930 (1898); McKnight v. Kingsley, 48 Ind. App. 372, 92 N.E. 743 (1911). However, a transfer made after marriage based upon an antenuptial oral promise (unenforceable under the Statute of Frauds) has been treated as without consideration. Gagnon v. Baden-Lick Sulphur Springs Co., 56 Ind. App. 407, 105 N.E. 512 (1914).

[113]McKain v. Rigsby, 250 Ind. 438, 237 N.E.2d 99 (1968).

[114]Inter-City Contractors Serv., Inc. v. Jolley, 277 N.E.2d 158 (Ind. 1972). It seems that the need for a prompt hearing may be controlled by Trial Rule

Obliquely the Indiana Supreme Court has reaffirmed the doctrine that the receiver and the receivership court control the right to press derivative actions,[115] and the statute giving the Insurance Department somewhat exclusive rights to seek a receivership and similar remedies against an insurance company has been construed to deny the granting of derivative relief against third parties.[116] In the liquidation of a local insurance company, the court of appeals[117] correctly denied a Florida ancillary liquidator any claim to assets in Indiana (rights under a re-insurance agreement) and left Florida creditors the alternative of pursuing their claims in the Indiana liquidation or on property of the debtor in Florida, if any. An order of distribution fixing rights and priorities to funds in the receivership was allowed to be modified upon petition of an adversely affected creditor or shareholder within thirty days after the filing of the receiver's final report.[118] This casts some serious doubts upon the appealability and finality of orders during the course of the receivership.

65(B) which applies to temporary restraining orders. This question was not considered in the case. *Cf.* Indianapolis Mach. Co. v. Curd, 247 Ind. 657, 221 N.E.2d 340 (1966).

[115]Sacks v. American Fletcher Nat'l Bank & Trust Co., 279 N.E.2d 807 (Ind. 1972). *Compare* Mooresville Bldg., Sav. & Loan Ass'n v. Thompson, 212 Ind. 306, 9 N.E.2d 101 (1937), *with* Siegel v. Archer, 212 Ind. 599, 10 N.E.2d 626 (1937). The case correctly held that shareholders could pursue parties dealing with the corporation to the extent that claims against them were not derivative. *Cf.* INDIANA CIVIL CODE STUDY COMM'N, IND. R. TR. P. 231, Comment (Proposed Final Draft 1968).

[116]State *ex rel.* Great Fidelity Life Ins. Co., v. Circuit Court, 288 N.E.2d 143 (Ind. 1972). The court applied IND. CODE § 27-1-20-23 (1971). The statute allows a judgment creditor to initiate such proceedings. In this case the court also denied a shareholder in a proxy fight the right of access to stockholder lists and relegated the shareholder to the Department of Insurance. The dissent correctly regarded this as the abandonment of a clear judicial function and responsibility.

[117]A very interesting decision revealing the almost unmitigated gall of the Florida receiver who demanded the share of Florida creditors in rights under a re-insurance agreement which gave no direct rights to policyholders. Florida *ex rel.* O'Malley v. Department of Ins., 291 N.E.2d 907 (Ind. Ct. App. 1973).

[118]Johnson v. Jackson, 284 N.E.2d 530 (Ind. Ct. App. 1972). The court applied IND. CODE § 34-2-7-1 (1971), allowing any creditor or shareholder or other interested party to file objections within 30 days from the filing of the receiver's final account. *Cf.* Trial Rule 52(B) (allowing reopening of judgments); IND. CODE §§ 33-1-6-3, -4 (1971); Holiday Park Realty Corp. v. Gateway Corp., 289 N.E.2d 292 (Ind. 1972) (court could reopen judgment within time for filing motion to correct errors).

Q. Rights of Creditors in Decedents' Estates

Some very interesting cases involving the rights of creditors with respect to deceased persons have been resolved by current litigation of special interest to lawyers. It is generally recognized that the claims and property rights of a deceased person against others may be pursued by heirs without administration, provided that they make a showing that it is not necessary.[119] In a somewhat parallel situation it was held that neither heirs nor devisees could pursue rights to undistributed assets without reopening the estate and procuring the appointment of an administrator de bonis non.[120] This result certainly lacks the virtue of cutting red tape in the administration of decedents' estates.

The strict statutory scheme for the allowance of claims against dead people spawns litigation, old and new. A ridiculously technical decision concerned the rights of a tort claimant against a nonresident motorist who was involved in an Indiana accident and who died before suit was commenced. Although the Indiana nonresident motorist statute allows service upon a representative through the Secretary of State, the court of appeals held that death terminated the authority of the Secretary to receive service of process when no representative had been appointed at the time of service.[121] The court apparently became cognizant of the absurdity of its holding which was softened in rehearing by noting that the statute of limitations would be tolled under the Journey's Account Statute.[122] This of course does not subtract from the delay, but will save the plaintiff if and when a personal representative is appointed sometime, somewhere.[123] In *In re Estate of Gerth,*[124] the plaintiff filed

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[119]Jester v. Gustin, 158 Ind. 287, 63 N.E. 471 (1902); Magel v. Milligan, 150 Ind. 582, 50 N.E. 564 (1898); Finnegan v. Finnegan, 125 Ind. 262, 25 N.E. 341 (1890).

[120]McGahan v. National Bank, 281 N.E.2d 522 (Ind. Ct. App. 1972). *But cf.* W.Q. O'Neall Co. v. O'Neall, 108 Ind. App. 116, 25 N.E.2d 656 (1940).

[121]Morris v. Harris, 293 N.E.2d 202 (Ind. Ct. App. 1973). The nonresident motorist statute is IND. CODE § 9-3-2-1 (1971). Among other things the statute provides: "[s]uch appointment of the secretary of state shall be irrevocable and binding upon his executor or administrator."

[122]Morris v. Harris, 295 N.E.2d 159 (Ind. Ct. App. 1973) (denying rehearing). The Journey's Account Statute extends the statute of limitations when an action "abates" for a cause except negligence in the prosecution.

[123]This is not made clear by the case, but it seems that if a representative is appointed over the deceased nonresident motorist in the state of his residence, service may be obtained by serving the Secretary of State who will then be agent of the representative. A judgment in such case probably would

his claim within the six-month period, but it was unverified. When the plaintiff submitted an amended claim in proper verified form before trial, the court held that the claim was properly filed and should have been allowed. Trial Rule 15(C), which makes the amendment relate back, was applied—a result which may make inept probate lawyers squirm. Not all rights of creditors must be pursued under the general claims provisions of the Probate Code. *Menniear v. Estate of Metcalf*[125] implicitly recognized that a principal may reclaim property from the estate of a decedent agent, subject to set-off for amounts owed by the reclaimant.[126] Although a general boilerplate provision in a will providing for the payment of creditors does not dispense with the necessity for creditors to properly file their claims,[127] a recent case reopens the matter by recognizing that a bequest made to discharge a duty or obligation to a debtor who predeceases the decedent will not lapse although the Probate Code does not deal with the situation.[128]

On the substantive side a very unfortunate decision of the supreme court held that the disinherited wife and children, bene-

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be binding upon the foreign representative and would be entitled to full faith and credit against him. *E.g.*, Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969) (overwhelming weight of authority); Brooks v. National Bank, 251 F.2d 37 (8th Cir. 1958) (holding that statute of limitations where suit commenced controlled and not the nonclaim provision of the state of administration); Hayden v. Wheeler, 33 Ill. 2d 110, 210 N.E.2d 495 (1965); Toczko v. Armentano, 341 Mass. 474, 170 N.E.2d 703 (1960); *cf.* Leighton v. Roper, 300 N.Y. 434, 91 N.E.2d 876 (1950) (did not decide whether Indiana would be required to give full faith to New York judgment against an Indiana representative); 36 CHI.-KENT L. REV. 157 (1959). Had the action been commenced before the nonresident died it should have been continued by substituting the representative if and when he was appointed. *Compare* Kibbey v. Mercer, 11 Ohio App. 2d 51, 228 N.E.2d 337 (1967), *with* IND. R. TR. P. 25(E) *and* INDIANA CIVIL CODE STUDY COMM'N, IND. R. TR. P. 25(E), Comment (Proposed Final Draft 1968).

[124]283 N.E.2d 578 (Ind. Ct. App. 1972).

[125]286 N.E.2d 700 (Ind. Ct. App. 1972).

[126]A person claiming personal property in the possession of a decedent does not bring replevin, but must file a petition to reclaim in the probate court. *Compare* Isbell v. Heiny, 218 Ind. 579, 33 N.E.2d 106 (1941), *with In re* Collinson's Estate, 231 Ind. 605, 106 N.E.2d 225 (1952).

[127]Lewis v. Smith's Estate, 130 Ind. App. 390, 162 N.E.2d 457 (1959). Heirs and devisees are not required to file claims. Rush v. Kelley, 34 Ind. App. 449, 73 N.E. 130 (1905).

[128]*See* Farmers & Merchants State Bank v. Feltis, 276 N.E.2d 204 (Ind. Ct. App. 1971). A bequest to "Roy Lytle in return for the assistance and aid that he has extended to me over the past many years" was held to lapse as it did not purport to be made to pay a debt or obligation.

ficiaries of a support order entered in a divorce case, have no claim against the estate of the father on the theory that the duty is personal and dies with the obligor.[129] The supreme court reached far in the past to resurrect this rule and in doing so it created further cause for lay suspicions that probate principles are in need of reform at the judicial level as well as in the legislature.

The dead man's statute often impairs claims of creditors.[130] Two current decisions weaken its effect and unseal the lips of those otherwise in a position to testify. One held that a lawyer who counselled the deceased at the negotiations leading to an alleged account stated was not "an agent in the making or continuing of a contract" since he did not negotiate it.[131] In another the guest of the decedent when involved in a motor vehicle accident was allowed to testify when it was established that his claim was covered by the decedent's liability insurance.[132] The result was reasoned on the theory that testimony with respect to a transaction with a deceased person should not be excluded when its effect will not deplete his estate, which was the case when the witness's claim was payable by an insurer.

R. Miscellaneous

Several miscellaneous new decisions are worthy of mention to those interested in the rights and obligations of debtors and creditors. The United States Supreme Court has indicated that the states may be subject to their own exemption laws.[133] The rule that the courts will not take judicial notice of reasonable attorney's fees and that formal proof of their value is not required has been reaffirmed,[134] but apparently repudiated when it involved al-

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[129]McKamey v. Watkins, 273 N.E.2d 542 (Ind. 1971). The court followed an 1859 case for this result and rejected a 1946 opinion from Ohio to the contrary.

[130]IND. CODE §§ 34-1-14-6, -11 (1971).

[131]Hoopingarner v. Bowser, 287 N.E.2d 570 (Ind. Ct. App. 1972).

[132]Jenkins v. Nachand, 290 N.E.2d 763 (Ind. Ct. App. 1972).

[133]James v. Strange, 407 U.S. 128 (1972) (statute imposing liability upon indigent criminal defendant who was furnished counsel held unconstitutional to the extent that debtor was denied exemptions).

[134]Marshall v. Russell R. Ewin, Inc., 282 N.E.2d 841 (Ind. Ct. App. 1972). The case was interesting in that the note secured by a mortgage provided for attorney's fees but the mortgage did not. Since the amount allowed was based upon services in connection with recovery upon the note (not in the foreclosure of the mortgage), the award was affirmed.

lowing extra attorney's fees for appeal work.[135] A good example of a real estate mortgage foreclosure decree is found in *Marshall v. Russell R. Ewin, Inc.*[136] The right to recover security deposits held by a landlord was recognized as the basis for a class suit.[137] Failure to furnish a nonmilitary affidavit, as required by the federal Soldiers' and Sailors' Relief Act, does not furnish grounds for avoiding a default judgment against a defendant or persons not in the military service.[138] The text-book rule that a binding agreement between principal and creditor altering the former's duty of performance will discharge the surety was applied to a case in which the creditor reduced the payments to be made on the balance on a loan.[139] A surety discharging the obligation of his principal was subrogated to security held by the creditor and his rights to collect accounts receivable directly from account debtors.[140] A creditor indorsing a check carrying a notation that it is in full settlement of all claims was allowed to show to the contrary upon a motion for summary judgment by the drawer—even when payment was not raised by an affirmative defense.[141] The result here unnecessarily subjects to litigation a commercial transaction which should be undone only by solid evidence.[142] And slavery may be back—for divorced husbands who refuse to work and pay support. At least *Slagle v. Slagle*[143] seems to say that a man who is able to work cannot escape a civil contempt order by living with his mother and refusing to work.

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[135]Willsey v. Hartman, 276 N.E.2d 577 (Ind. Ct. App. 1971).

[136]282 N.E.2d 841 (Ind. Ct. App. 1972).

[137]Boehne v. Camelot Village Apts., 288 N.E.2d 771 (Ind. Ct. App. 1972). In reversing the lower court, the court of appeals held that former tenants should be allowed to establish a community of interest in support of the class action, although the court recognized that each member of the class might be required to establish his own damages.

[138]Duncan v. Binford, 278 N.E.2d 591 (Ind. Ct. App. 1972).

[139]Indiana Telco Fed. Credit Union v. Young, 297 N.E.2d 434 (Ind. Ct. App. 1973).

[140]Ertel v. Radio Corp. of America, 297 N.E.2d 446 (Ind. Ct. App. 1973).

[141]Linden Packing Co., Inc. v. Heinhold Hog Mkt., Inc., 294 N.E.2d 848 (Ind. Ct. App. 1973).

[142]*But cf.* Fidelity & Deposit Co. v. Standard Oil Co., 101 Ind. App. 301, 199 N.E. 169 (1936) (without discussing the evidence, the court found it conflicting, although a check received by the creditor carried the notation, "In full gas and oil project N. 163").

[143]292 N.E.2d 624 (Ind. Ct. App. 1973).

XII. Taxation: Legislative Reform

*Carlyn E. Johnson**

The 1973 Indiana General Assembly enacted the first substantial changes in the laws affecting state and local revenues and expenditures in Indiana since 1963.[1] These changes are administratively complex, will result in substantial shifts in tax burdens among various taxpayers, and will force local governments to look to specific, nonproperty sources for additional revenues.

The changes can be better understood if it is recognized that the legislature was not attempting with this tax program to provide additional revenue for additional governmental expenditures. Indeed, the overriding consideration was to effect a direct, visible reduction in property taxes and to curb future increases in such taxes. Since local governments obviously could not be expected to exist without increases in expenditures, the program also had to include provisions for alternative revenue sources.

The direct, visible reduction in property taxes is provided by credits, funded through increases in state sales and corporate income taxes, while the curb on future property tax increases comes through a freeze of 1973 property tax levies or rates. The alternative revenue sources for schools are state funds and for all other units of local government, local income taxes. Much of the complexity of the program stems from legislative efforts, however feeble, (1) to require each group of taxpayers, *e.g.*, corporations, unincorporated business, individuals, etc., to contribute new taxes in relatively the same proportion in which they will receive relief from property taxes and (2) to make provision for the obvious inequities which will be created by freezing present property tax revenue levels for *every* taxing unit in the state.[2]

A. Direct Reduction Of Property Taxes

Whatever the facts, the legislature was persuaded that the

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[1]Ind. Pub. L. Nos. 45, 47, 50, 236 (April 24, 1973).

[2]Every governmental unit with authority to levy property taxes is a taxing unit—92 counties, 1009 townships, 305 school corporations, over 550 cities and incorporated towns, plus hundreds of other special function districts, *e.g.*, library, sanitation, conservation, and park districts.

property tax in Indiana was too high and that a rollback was necessary. Thus was born the twenty percent property tax credit for *every* property taxpayer in the state.[3] The new law provides that beginning in the calendar year 1974, and each year thereafter, every taxpayer will receive a credit of at least twenty percent of his property tax, a plan which, on the surface, seems simple and equitable. But in some taxing units, federal general revenue sharing funds were used to replace property taxes in 1973. Applying the credit *after* this replacement would penalize taxpayers in those taxing units vis-a-vis taxpayers residing where revenue sharing funds had not been so used and thus act as a disincentive for counties to use revenue sharing funds for tax reduction in the future. The same problem will occur in counties which choose to adopt a local income tax because the statute requires that a portion of such tax be used to reduce property tax levies.[4] If the twenty percent credit were simply applied to the amount of tax actually due from each taxpayer, counties which have adopted the local income tax, and thus reduced property taxes, would receive less money from the state than if they had not adopted it.

To account for these problems, the program as finally adopted, requires that the credit for each taxpayer be computed based on his actual tax liability *plus* any amounts by which his taxes were reduced because revenue sharing or county income tax funds were used to replace property taxes.[5] This means, of course, that county auditors must compute two tax liabilities for each taxpayer —his actual liability and his theoretical liability, computed as if there had been no revenue sharing or local income tax funds used to replace property taxes.

The twenty percent credit will cost the state approximately $224 million each year[6] and obviously could not be funded without increased state taxes. So a Property Tax Replacement Fund[7] was created into which will be paid fifty percent of the doubled state sales tax *(i.e.,* approximately the amount attributable to the in-

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[3]IND. CONST. art. 10, § 1, requiring uniform assessments and rates, prohibits most forms of selective property tax relief. Numerous recent legislative efforts to amend this section have failed.

[4]Ind. Pub. L. No. 50, § 5 (April 24, 1973).

[5]Ind. Pub L. No. 45, § 3 (April 24, 1973).

[6]Indiana Comm'n on State Tax and Financing Policy, Cash Flow for Tax Packages as Passed April 13, 1973 (Xerox).

[7]Ind. Pub. L. No. 45, § 3 (April 24, 1973).

crease in rate from two percent to four percent). Food for home consumption was exempted from the sales tax and the eight dollar per person credit against state income taxes originally enacted in lieu of such food exemption was eliminated. The doubling of the sales tax and the food exemption were effective on May 1, 1973 while elimination of the credit is effective for 1973 tax returns. Thus taxpayers will have paid a two percent sales tax on food purchases for the first four months of 1973, for which they will receive no income tax credit. Other changes in the Indiana sales tax law include an elimination of the sales tax exemption for materials purchased by speculative builders[8] and narrowing of the exemption for purchases by public utilities.[9]

State taxes on corporations were both increased and decreased as part of this new package, some of the increased revenue going into the Property Tax Replacement Fund and some into the state's general fund. Much of the criticism leveled at the legislature's tax program when first unveiled was that individuals would pay most of the increased taxes while business would receive most of the property tax relief.[10] Initially the package in-

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[8]IND. CODE § 6-2-1-39 (1971). This rather unique exemption for speculative builders has been part of Indiana's sales tax law since 1965. The justification for it has been that it made the sale of speculative homes competitive with older homes which, as real property, are not subject to sales tax. The contract builder, however, has always been and continues to be required to pay sales tax on items to be incorporated in the building.

[9]When the sales tax was originally adopted in 1963, public utilities were granted an exemption from sales tax on all their purchases of personal property, a benefit not shared by manufacturers generally. *Id.* § 6-2-1-39(6). The latter were exempted only from paying tax on purchases to be directly used in production. The 1973 amendment limits the public utility exemption to purchases of tangible personal property to be directly used in direct production. The change means that utilities will pay an estimated $7.5 million more in additional sales taxes annually. Cash Flow for Tax Package, *supra* note 5. The 20% annual property tax credit, however, will result in a reduction of some $29 million in property taxes paid by utilities.

[10]A uniform percentage reduction in property tax will inevitably result in greater tax relief to businesses simply because business pays most of the property tax. The distribution of property taxes paid in Indiana is as follows:

Farm	14.7%
Other Business	40.8%
Utilities	11.9%
Residential and Individual	32.6%

Indiana State Board of Tax Commissioners, Property Tax Analysis, March 1, 1971, Payable 1972, December 6, 1972. *See also* Indianapolis Star, Jan. 27, 1973, at 2; Indianapolis News, Jan. 25, 1973, at 4.

creased only the corporate adjusted gross income tax from two percent to four percent. This tax is paid by fewer than eight percent of the total number of taxpaying corporations in Indiana,[11] yet all the remaining corporations, which are subject to the gross income tax, would receive substantial property tax relief under the twenty percent property tax credit program. Unwilling to increase the gross income tax, the legislature finally compromised on an increase in the corporate adjusted gross income tax to three per cent, the imposition of an entirely new Supplemental Corporate Net Income Tax on *all* corporations, to be paid *in addition* to the existing gross and adjusted gross income taxes,[12] and a decrease in the gross income tax by five per cent each year, thus phasing it out over a twenty year period.[13]

B. Local Income Taxes

Since the amount of property tax which may be collected in the future has now been strictly limited, counties have been given the option of adopting a local county-wide adjusted gross income tax to be levied on individuals residing or working in the county and collected for the county by the state. To be effective such tax must be adopted by a majority vote of the county council and may be adopted at the rate of one percent, three-quarters of one percent, or one-half of one percent. Once adopted the tax may not be rescinded for a period of four years, although presumably the county council could either raise or lower the rate during that four year period.[14]

Since property taxes generally are to be frozen under this program, this local income tax is the only significant source of revenue for additional expenditures for *all* local units of government (except schools). Generally, it is in the cities where the demand for additional governmental expenditures and costs of services are rising most rapidly. Yet the county council is given the authority to impose or not impose the tax. One can easily imagine a county council asking why it should take the blame

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[11]Memorandum from Administrator, Indiana Department of Revenue, Income Tax Division, to Director, Commission on State Tax and Financing Policy, March 22, 1973.

[12]Ind. Pub. L. No. 50, § 8 (April 24, 1973). The tax base of the new Supplemental Corporate Net Income Tax is the same as the corporate adjusted gross income tax base, less the amount of the gross or adjusted gross income tax for which the corporation is liable. The new tax is to be levied initially at the rate of 2%, increasing to 2½% in 1975, and 3% in 1977.

[13]Ind. Pub. L. No. 47, § 1 (April 24, 1973).

[14]Ind. Pub. L. No. 50, § 7 (April 24, 1973).

for imposing a new additional tax on county residents in order to provide money for cities over which the county council has no control. Indeed, only thirty-four of ninety-two counties have, in fact, adopted the local income tax for 1974.[15]

Perhaps in order to make it easier for county councils to adopt the tax, the legislature mandated that some portion of the income tax must be used for further property tax relief (in addition to the twenty percent direct credit to taxpayers). The higher the rate at which the tax is adopted, the greater the proportion which must be used for tax relief initially. However the amount to be so used diminishes each year for three years and remains constant thereafter.[16]

While this requirement may, indeed, make it easier for county councils to adopt the tax (by allowing them to tell their constituents that they are providing tax relief rather than simply raising additional revenue for government expenditures), it will serve to make administration of the local income tax extremely complex. The amounts set aside for property tax relief (called Property Tax Replacement Credits) are to be distributed to every taxing unit in the county (including schools) in the proportion that each taxing unit's property tax levy bears to the total county levy. But, as with the twenty per cent credit, any federal revenue sharing funds used to reduce property tax levies and any of the remaining portion of the local income tax used to further reduce property taxes must be added back to the levy before the property tax replacement credits are distributed.[17] To do otherwise would penalize taxpayers in jurisdictions in which taxes were so reduced. Thus, as with the twenty per cent credit, a *theoretical* computation of tax levies will be required for *every* taxing unit in each county which has adopted the tax.

Article 10, section 1 of the Indiana Constitution has been interpreted to mean that with certain specified exceptions all property within any given taxing unit must be assessed and taxed

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[15]Indiana Dep't of State Revenue, Circulars CO-3 (June 5, 1973) & CO-3A (July 20, 1973).

[16]Ind. Pub. L. No. 50, § 7 (April 24, 1973).

[17]Indiana has forty-one school corporations which encompass territory in more than one county. If one of those counties adopts a local income tax, the property tax replacement credit distributed to the school corporation reduces the tax rate only for taxpayers who reside in the county levying the income tax. *Id.*

at the same rate.[18] This provision is intended to insure that taxpayers in like circumstances are charged at the same rate for the same governmental services. But in a situation in which one county levies a local income tax and another does not, the school tax rate in the former county will be lower than the rate charged in the latter county. Query whether this is not a violation of this consitutional provision? Assume, for example, two similar corporations, both located within the school district, one in the county which has levied the income tax, the other in a county which has not. Since corporations are not subject to the local income tax, the one located in the adopting county will enjoy a lower property tax rate and therefore a lower overall charge for school costs than the similar corporation in the county which has not adopted the local income tax.

The remainder of the local income tax not used for property tax relief (called Certified Shares) is not distributed to all the taxing units in the county but only to "participating taxing units," *i.e.*, the county, the townships, and the cities and towns within the county,[19] and may be used for additional expenditures or further property tax reduction. Schools are excluded because the tax package provides no alternative local revenue source for school corporations. All *additional* funds for schools will now come from the state. The distribution of the certified share portion of the income tax is to be based on a so-called "attributable tax levy," defined as the levy of the unit entitled to receive a certified share plus the tax levies of any special taxing district or agency performing a function reasonably attributable to the participating tax unit. The newly created Local Property Tax Control Board is charged with responsibility for determining the attributable tax levy for each unit entitled to receive these certified shares. For example, a county-wide library district would presumably be attributable to the county, but to which unit would a special sanitation district be attributable, or a library district encompassing less than the entire county? Since the law provides that the unit receiving a certified share may appropriate or transfer any part of the funds to any unit whose levy was attributable to it,[20] the legislature seems to have made this distribution unnecessarily complex. It could seemingly have accomplished the same goal by simply providing for distribution of the certified shares to all taxing units except schools.

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[18]Bright v. McCollough, 27 Ind. 223 (1866).

[19]Ind. Pub. L. No. 50, § 7 (April 24, 1973).

[20]*Id.*

The great variety of possible local income tax rates will complicate withholding procedures for employers. A large employer drawing employees from a multi-county area may be required to withhold state or local income taxes at as many as five different withholding rates. An employer located in a county which has not adopted the tax withholds no local income tax for residents of his own county. If he is located in a county which has adopted the local tax, he must withhold at whatever the local rate is for residents of the county, at the rate of one-quarter of one percent for his employees who reside in a nonadopting county, and for those employees who reside in an adopting county, at the appropriate rate in those counties. To minimize the employer's problem of keeping track of employees' changes of residence, the legislature provided that an individual's residence as of January 1 each year would govern tax liability. The law provides specifically that "subsequent changes during a calendar year of an individual's residence . . . shall not alter or affect such individual's liability for county income taxes based upon his residence as determined in accordance with the standards and date herein before established."[21] Thus, an individual who on January 1 resided in a county which had adopted the local income tax would be liable for the tax to that county for the entire calendar year even though he may have moved out of it on January 2. Admittedly, this simplifies the administrative problems, but query whether such county, in fact, continues to have jurisdiction over this individual for purposes of taxing his income?

C. Property Tax Limits

This new tax program severely limits the amount of money which any unit of local government may raise from the property tax beginning in 1974. For those counties which have adopted a local income tax, the property tax *levy* for each taxing unit is frozen at its 1973 level, that is, the actual amount of money raised from the property tax. In these units property tax rates will decrease as assessed valuation increases and vice versa. For those counties which have *not* adopted a local income tax the property tax *rate* imposed in 1973 is frozen.[22] In these cases the only additional local tax revenue available will come from increases in assessed valuation. The freeze generally does not apply to levies or rates for debt or lease-rental obligations and, once again, any amounts of federal revenue sharing funds used in 1973 to reduce

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[21] *Id.*

[22] *Id.*

the tax levies must be added back to the levy before the freeze is applied.

Like the twenty percent credit to all taxpayers, this freeze of tax rates or levies seems fairly simple on the surface, but it may create some serious inequities, and will certainly result in significant shifts in local tax burdens. The county council will now determine the source of additional local revenue—either the income tax or increases in assessed valuations. If the local income tax is adopted and tax levies frozen, most of the additional burden will fall on individuals since corporations are not subject to the local income tax. Not only will corporations have some of their property taxes replaced with the income tax, paid only by individuals, but they will pay no more in property taxes than in 1973, and, indeed, if assessed valuations increase, their property tax *rates* will be lower. Alternatively, if no local income tax is adopted and tax *rates* are thereby frozen, only those taxpayers whose assessed valuations increase will pay more tax. Since real property assessments tend not to change except in reassessment years (every sixth year), only businesses with increasing personal property valuations or those businesses or individuals engaged in new construction will pay the additional tax burden.

Further, increased revenues from increases in assessed valuation obtained by a county's rejecting the local option income tax may be short lived. The statute seems to state that in adopting counties the 1973 property tax levy is frozen, without regard to when the local income tax is adopted,[23] thus a county is forced to forego any such increased revenues if it chooses at a later date to adopt the income tax. This provision would certainly seem to serve as a disincentive for growing counties ever to adopt the income tax. It is questionable whether the legislature intended such a result.

Other shifts in tax burdens will occur. For example, a county with a substantial number of nonresident property taxpayers which adopts the income tax has given a windfall to those nonresidents. They will not be subject to the income tax and since the levy is frozen, they will pay no higher property taxes while continuing to enjoy the benefits of the county's services at the expense of the county residents.

D. Local Property Tax Control Board

Anticipating that these very severe financial restrictions could

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[23] *Id.*

work a hardship on some communities, the legislature created a new state level board called the Local Property Tax Control Board.[24] Communities which feel they cannot carry out their functions and responsibilities within these financial limitations may appeal for relief through the State Board of Tax Commissioners to this new Tax Control Board. The Board is authorized to recommend one or more of five very specific types of relief, *i.e.*,

1. A loan to the community from the state,
2. Permission to reallocate that portion of the local income tax statutorily required to be used for property tax replacement,
3. Permission to increase the property tax levy in cases of annexation or extension of governmental services to areas where property had not been previously subject to property taxes for that service,
4. Permission to impose a property tax levy of up to $1.50 for those communities which have not imposed an ad valorem property tax levy for four or more years,[25] and
5. Permission to increase the property tax levy in order to provide or operate community mental health and mental retardation centers.[26]

Perhaps mindful of the fact that since 1937 Indiana statutes have contained meaningless maximum property tax rate limits of $1.25 or $2.00, which may be exceeded in cases of "reasonable necessity" by authority of the State Board of Tax Commissioners,[27] the legislature gave the Local Tax Control Board no general power to grant relief in emergency or unforeseen situations. With this specific listing of the forms of relief the Local Tax Control

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[24]*Id.* The current members of the Board are: Richard L. Worley, State Board of Accounts; Robert J. Burns, State Board of Tax Commissioners; Garnett Inman, Mayor, New Albany; Hugh A. Barker, Public Service Indiana; James T. Robison, former state legislator; Howard Goodhew, South Bend; and Virgil King, Hebron. Representative William L. Long, Lafayette, and Senator Joseph W. Harrison, Attica, are ex officio members.

[25]This provision applies to those few communities which have been able in the past to operate exclusively on nonproperty tax revenues.

[26]Ind. Pub. L. No. 50, § 7 (April 24, 1973).

[27]IND. CODE §§ 6-1-46-3, -5 (1971). Virtually every taxing unit in the state levies a total tax rate of more than $2.00. Presumably, in each case, there is "reasonable necessity" for doing so.

Board may grant, the legislature assumes it has anticipated all possible reasons that a local government would need financial relief —a somewhat bold, and probably erroneous, assumption. An absolute freeze of property tax rates or levies cements into the system whatever inequities or errors existed at the time the freeze was imposed.

One example will suffice. In Brown County, 1973 budgets and tax rates were certified by the State Board of Tax Commissioners using an assessed valuation overstated by the county auditor by $2.9 million, due largely to errors in transcription. Specifically almost $1.5 million of the error occurred because one personal property tax assessment of $14,660.00 became, in the transcription process $1,466,000.00.[28] If Brown County had not, in fact, adopted a local income tax, the 1973 certified tax rate would have been frozen—a rate based on an erroneous assessed valuation. The Local Tax Control Board would not have had statutory authority to allow levy of a higher tax rate in Brown County next year. This is the kind of situation which obviously the legislature could not have been expected to anticipate, but it also illustrates the folly of the legislature's refusal to give some administrative agency the authority to make exceptions when necessary.

E. Conclusion

This new tax package is a response to pressure, from whatever source, for a reduction in property taxes. To fund the reduction, new taxes had to be imposed. To make the tax increases tolerable to the electorate, the legislature felt it needed iron-clad guarantees that property taxes would not increase again in the future—thus the rate and levy freezes, with all their attendant complications. Unwilling to assume responsibility for imposition of any further additional taxes, the legislature put the burden on local governments to adopt or not adopt the local income tax. But equally unwilling to allow local government the pleasure of spending the money it raises, the legislature then mandated the use of a portion of the money. The net result of these interlocking considerations is an extremely complex package of restrictions which local government must learn to understand. Many questions remain unanswered and the legislature in 1974 may be called upon to consider some major revisions in the package.

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[28]The Brown County Democrat, June 13, 1973, at 1, col. 8.

XIII. TORTS

*Theodore Lockyear**

By overruling outmoded precedents and by innovating when necessary, the appellate courts have significantly overhauled Indiana tort law during the survey period. Although there were some notable exceptions—especially in the application of the discretionary immunity doctrine to several school cases—these courts have provided new remedies for many diverse classes of injured plaintiffs. Indeed, these decisions have surpassed those of other jurisdictions in this area. This section will review many of these advances and attempt to underscore their significance.

A. Immunities

Although deciding that the governmental-proprietary delineation could no longer be utilized to protect the State under the sovereign immunity doctrine, *Campbell v. State*,[1] in dicta, may nevertheless have provided a similarly protective distinction for the State. In *Campbell*, the court refused to abrogate all instances of the immunity doctrine.[2] In fact, a phrase from a quotation in the opinion from Dean Prosser may have opened the avenue for a discretionary-ministerial distinction.[3] Left undecided, however, were the ambits of such a discretionary privilege. In two subsequent decisions, the appellate courts simply asserted that *Campbell* was controlling and consequently found the State liable.[4]

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The author wishes to express his appreciation for the able assistance of Jerry Atkinson and Steve Barber.

[1]284 N.E.2d 733 (Ind. 1972). For other decisions abrogating immunities of the county and of municipalities, see Klepinger v. Board of Comm'rs, 143 Ind. App. 155, 239 N.E.2d 160 (1968); Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967).

[2]For example, the court mentioned inadequate police protection, a negligent appointment of an individual whose incompetent performance gives rise to an action, and judicial immunity as certain areas of privileged behavior. 284 N.E.2d at 737.

[3]The specific quotation was: "[I]n several of the decisions abrogating the immunities, there was language that there might still be immunity as to 'legislative' or 'judicial' functions, or as to acts or omissions of government employees which are discretionary." *Id.* at 737. *See also* Note, *Sovereign Immunity in Indiana—Requiem?*, 6 IND. L. REV. 92 (1972).

[4]State v. Daley, 287 N.E.2d 552 (Ind. Ct. App. 1972); State v. Turner, 286 N.E.2d 697 (Ind. Ct. App. 1972).

However, in *Driscol v. Delphi Community School Corp.*,[5] the court of appeals refused to find liability on the part of the State. A high-school girl fell and broke her leg while running from her gym class to the locker room. A cause of action for negligence against the gymnasium instructor and the school alleged that the defendants had proximately caused the fall by not allowing enough time between classes and thus forcing the plaintiff to hurry to the locker room. Whether the holding was pinned on the grounds that these acts or omissions of the defendant were simply not unreasonable or whether the state was protected by the discretionary exception tangentially referred to in *Campbell* is uncertain. The court concluded, however, by stating that:

> There is no evidence to support any inference that the necessity for the running or the conditions under which it was done is the result of any negligent execution of a ministerial function or duty. By the same token, there is no proof that class size, dressing room crowding, time allowed for dressing, etc., are conditions created by "discretionary" acts or omissions, although that explanation appeals to our vague common-sense notion of schools in general.[6]

Following the *Driscol* decision, the court in *Miller v. Griesel*[7] again applied the discretionary exception to another action against school officials. In *Miller*, a student opened a box containing a detonator cap which the student thought was a Christmas light. When he touched this cap, it exploded causing permanent injuries to his left eye. The teacher had left the room but had made arrangements for another teacher to check the room occasionally. A school administrative rule sanctioned this procedure. The court held that "no liability could attach to the defendants once the trial court determined as a matter of law that a reasonable rule had been promulgated and that the teacher's actions in leaving the classroom during the half-hour recess period was discretionary."[8] Seemingly, the courts have presumed that school officials are protected under the discretionary exception.

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[5]290 N.E.2d 769 (Ind. Ct. App. 1972).

[6]*Id.* at 774-75.

[7]297 N.E.2d 463 (Ind. Ct. App. 1973).

[8]*Id.* at 471.

This protection has been severely castigated as an illogical relic of ancient legal principles.[9] Every act or omission is somewhat discretionary. No analytical framework exists to make the distinction between discretionary and ministerial acts any more precise than under the old governmental-proprietary test. Underlying the need for such a test is the necessity to allow the state to govern. If the courts feel it is imperative to continue this discretionary exception, an examination of certain factors may better determine the need or extent of any privilege. The courts might look to such factors as ". . . the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."[10] Such an approach would not rigidly exclude a whole class of plaintiffs from recovering damages.

In line with the jurisprudential notion of providing a remedy for every harm, the court in *Brooks v. Robinson*[11] abnegated the interspousal immunity doctrine. The basis of this immunity evolved out of the concern that such tort suits would disrupt marriage relationships and tend to promote fraud or trivial lawsuits.[12] Finding this doctrine to be judicially created, Justice Hunter concluded that these rationales were no longer tenable under modern practice, remarking that such an anachronistic privilege "requires the blanket assumption that our court system is so ill-fitted to deal with such litigation that the only reasonable alternative to allowing husband-wife tort litigation is to summarily deny all

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> [Although] the public school system in the United States . . . constitutes the largest single business in the country [it] is still under the domination of a legal principle which in great measure continues unchanged since the middle ages . . . .
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> . . . The principle [of sovereign immunity] is applied with complete disregard of the specific facts, in a more or less blanket fashion, regardless of whether the injury was the result of a falling building, or whether the pupil is killed by a swing.

Rosenfield, *Governmental Immunity from Liability for Torts in School Accidents*, 5 LEGAL NOTES ON LOCAL GOVERNMENT 358, 362 (1940). *See also* Repko, *Legal Commentary on Municipal Tort Liability*, 9 LEGAL COMMENTARY ON MUNICIPAL TORT LIABILITY 214 (1942).

[10]Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 230, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961).

[11]284 N.E.2d 794 (Ind. 1972).

[12]*Id.* at 796.

relief to this class of litigants."[13] The parent-child immunity doctrine[14] would seem to be suspect under the rationale of the *Brooks* and *Campbell* decisions. More importantly, these opinions reflect an appellate concern for shifting losses from the injured party to the actual wrongdoer. Finally, these decisions judicially acknowledge the role of insurance in modern American society.[15]

B. Products Liability

No area of Indiana tort law has been so revolutionized in the past decade as the products liability field. It is obviously beyond the scope of this section to review or even mention each of these developments.[16] Only the most recent or the most salient cases will be discussed here.

In *J.I. Case Co. v. Sandefur*,[17] the Indiana Supreme Court expounded upon the duty owed by a manufacturer to injured persons not in privity of contract with the manufacturer. Prior to *Sandefur*, numerous exceptions to the privity doctrine had evolved.[18] Noting that the privity doctrine was doddering under the weight of these exceptions,[19] the court, specifically adopting the rationale of *MacPherson v. Buick Motor Co.*,[20] remarked that a manufacturer owed "the duty to avoid hidden defects or concealed dangers."[21] Using the logic of *Sandefur* as a springboard, later federal court

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[13]*Id.* at 796-97.

[14]Smith v. Smith, 81 Ind. App. 566, 142 N.E.2d 128 (1924). For a discussion of a New York case abrogating the parent-child immunity doctrine, see 44 NOTRE DAME LAW. 1001 (1969).

Indiana had previously abolished the charitable immunity. *See* Harris v. Young Women's Christian Ass'n, 250 Ind. 491, 237 N.E.2d 242 (1968). *See also* 13 RES GESTAE, July 1969, at 22.

[15]Campbell v. State, 284 N.E.2d 733 (Ind. 1972).

[16]For an excellent review of Indiana case law in this area, see Frandsen, *Summary of Indiana Law on Products Liability*, INDIANA PRODUCTS LIABILITY HANDBOOK (1968). *See generally* Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967).

[17]245 Ind. 213, 197 N.E.2d 519 (1963).

[18]*See* Huset v. J.I. Case Co., 120 F. 865 (8th Cir. 1903).

[19]245 Ind. at 221, 197 N.E.2d at 522.

[20]217 N.Y. 382, 111 N.E. 1050 (1916).

[21]245 Ind. at 222, 197 N.E.2d at 523.

decisions, applying Indiana law, have completely eliminated the privity doctrine in cases of implied warranties and strict liability.[22]

Accompanying the expanded liability of manufacturers is the added responsibilities placed upon vendors. In *Dudley Sports Co. v. Schmitt*,[23] the court of appeals, in a case of first impression, embraced the *Restatement* position that "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."[24] The *Dudley* case involved a baseball pitching machine which had been manufactured by a Kansas company, but which only bore the name of Dudley Sports. Although there was no evidence of a specific claim by Dudley that it was the manufacturer, the court found that there were "no reasonable grounds . . . to believe otherwise."[25]

The throwing arm of the baseball machine could be set off by a slight vibration or a change in atmospheric conditions if the arm were left in a certain position, even if it were left unplugged. A sixteen-year-old student who was sweeping in the locker room was struck in the face by the throwing arm and sustained extensive facial injuries. In affirming a judgment for $35,000.00, the court reasoned that a vendor who holds himself out as the manufacturer of a product and labels it with his name is liable not only for his own negligence, but also for any negligence on the part of the actual manufacturer even though the vendor could not have reasonably discovered the defect.[26] The court concluded that since the machine was a potentially dangerous mechanism, Dudley was bound to provide a machine reasonably safe for its intended use. Dudley had not only failed to carry out this duty, but had also failed to provide a specific warning of the dangers involved.[27]

Another advancement in this field occurred in *Cornette v. Searjean Metal Products*[28] with the acceptance of the strict liability theory as embodied in section 402A of the *Restatement*. The court indicated that *Sandefur* and the strict liability concept are

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[22]*See, e.g.*, Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. 1965).

[23]279 N.E.2d 266 (Ind. Ct. App. 1972).

[24]RESTATEMENT (SECOND) OF TORTS § 400 (1965).

[25]279 N.E.2d at 274.

[26]*Id.* at 273.

[27]*Id.* at 280.

[28]147 Ind. App. 46, 258 N.E.2d 652 (1970).

"independant bases for a cause of action: the former based on negligent manufacture, inspection, assembly or repair and the latter on the § 402A protection against any defect rendering a product unreasonably dangerous regardless of fault."[29] The rationale for this advancement is to shift the losses from the injured party to the purchasing public—"In theory at least . . . if the price of the product accurately reflects the cost of the product, then the consumer is contributing to a fund for his own protection."[30] This decision had been foreshadowed by earlier federal cases.[31]

Under the strict liability action or the negligence theory, there are sometimes difficult problems in proving that the defect in fact caused the damage. *Mamula v. Ford Motor Co.*[32] suggests an appellate reluctance to deprive a plaintiff of a jury determination. In *Mamula*, a driver lost control of his car and the right front tie rod assembly was found 120 feet to the rear of the accident site. An expert testified that a broken tie rod assembly could have caused this accident. Following the principle outlined in *International Harvester Co. v. Sharoff*,[33] the court allowed the issues of whether the manufacturer had properly discharged its obligation to inspect and whether the tie rod was the cause of the accident to be submitted to a jury. Further, the majority wrote in *Mamula* that "a conflict exist[ed] from which a reasonable man could justifiably infer negligence" because the plaintiff "testified that *before* the accident occurred, he lost control of the steering" and an "essential element for steering, to-wit, the tie rod was found 120 feet *behind* the car." The majority concluded that it was not known "whether this tie rod fell off first, thereby causing the accident, or whether the accident itself caused the tie rod to fall off . . . ."[34] But the dissent maintained that the "mere fact that the driver of plaintiff's vehicle suddenly lost steering control, that the car struck the guard rail and median strip, and that the severed tie rod was found behind the point at which the vehicle came to rest" did not "permit a reasonable inference that the defendant

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[29]*Id.* at 52, 258 N.E.2d at 656.

[30]*Id.* at 53, 258 N.E.2d at 656. Judge Sharp wrote a concurring opinion in *Cornette* which gives an excellent overview of the strict liability theory. *Id.* at 55, 258 N.E.2d at 657.

[31]*See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965).

[32]275 N.E.2d 849 (Ind. Ct. App. 1972).

[33]202 F.2d 52 (10th Cir. 1953).

[34]275 N.E.2d at 853.

either failed to properly inspect the tie rod assembly or used inferior metal in manufacturing it, or failed to properly install it."[35] Admittedly, in *International Harvester,* there was evidence adduced that a visual inspection had been made of the allegedly defective part, whereas in *Mamula* there was no testimony on this subject. Yet the argument of the dissent, on this point, would be of little significance if the action had been framed around the strict liability theory. Indeed, it would seem that the majority was using a strict liability theory in the guise of a negligence action. In any case, *Mamula* is important in that it provides a guide to the type and quantum of evidence needed to establish whether the part was defective and whether the defect caused the accident.

C. Warranties

Although strict liability and warranty law have a few analogous features,[36] the latter has unfortunately retained many of the antiquated common law principles which have grown up with it. For example, the implied warranty doctrine has retained "the contract doctrine of privity, disclaimer, requirements of notice of defect, and limitations through inconsistencies with the express warranties."[37] However, one layer of these encrustations was shed in *Theis v. Heuer.*[38] In *Theis,* a purchaser of a new house brought suit against a building contractor for a breach of implied warranty and for negligence. Certain sewer lines which had been badly laid resulted in the collection of water and sewage on the first floor of the house. A motion under Indiana Rule of Trial Procedure 12(B) (6) was granted at the trial level for the building contractor. On appeal, this decision was reversed and the concept of caveat emptor was handed another set-back. A prior decision, *Tudor v. Heugal,*[39] which had applied the caveat emptor doctrine to real property was overruled.

The court reasoned that the disparate expertise between a building contractor and a purchaser, the anomalous treatment of real property as compared with personalty under Indiana warranty law, and the fact that the old law encouraged shoddy workmanship

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[35]*Id.* at 856.

[36]*See* Phillips, *Notice of Breach in Sales and Strict Liability Law,* 47 IND. L.J. 457 (1972).

[37]147 Ind. App. at 57, 258 N.E.2d at 658 (Sharp, J., concurring).

[38]280 N.E.2d 300 (Ind. 1972).

[39]132 Ind. App. 579, 178 N.E.2d 442 (1961).

all dictated this result.[40] Moreover, the court thought that there should be an "implied warranty for fitness for human habitation."[41] Significantly, there was an intimation that this "warranty for fitness for human habitation" doctrine would also be applicable to the landlord-tenant area since the court specifically noted a parallel development in landlord-tenant law.[42] The court continued that in "a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability."[43]

The second paragraph to the complaint alleged negligence in the construction of the sewer lines. The issue was whether a builder-contractor had a legal duty toward the purchaser of the house.[44] Holding that this paragraph also was sufficient to withstand a motion to dismiss, the court accepted Dean Prosser's assessment[45] that builders should be encompassed within the rule of *MacPherson v. Buick Motor Co.*[46] and be held to the general standard of reasonable care for the protection of buyers, even after the work was accepted.[47]

Certainly, warranty law has been given another shot in the arm with the recent decision of *Woodruff v. Clark County Farm Bureau Cooperative Association.*[48] Chickens sold to the plaintiff by defendant later died. The contract was oral but the plaintiff had signed a delivery receipt for the chickens which contained a general

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[40]280 N.E.2d at 304-05.

[41]*Id.* at 304.

[42]*Id.* at 305 n.1.

[43]*Id., quoting from* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 482, 268 A.2d 556, 559 (1970).

[44]It has been generally held that "the acceptance of the work by the other party to the contract operates as the intervention of an independent human agency which breaks the chain of causation . . . ." Hobson v. Beck Welding & Mfg., Inc., 144 Ind. App. 199, 207, 245 N.E.2d 344, 349 (1969).

[45]W. PROSSER, THE LAW OF TORTS § 104, at 680-82 (4th ed. 1971) [hereinafter cited as PROSSER].

[46]217 N.Y. 282, 111 N.E. 1050 (1916).

[47]280 N.E.2d at 306. This result was foreshadowed by Judge Sharp: "There is no logical reason for holding a manufacturer and contractor to different standards of care with respect to hidden defects." Hobson v. Beck Welding & Mfg., Inc., 144 Ind. App. 199, 208, 245 N.E.2d 344, 349 (1969).

[48]286 N.E.2d 188 (Ind. Ct. App. 1972).

disclaimer of any warranties. The court first found that since the defendant was a merchant of chickens and was aware of plaintiff's intended use, implied warranties of fitness for a particular purpose and of merchantability had arisen. However, since the "conspicuous" requirement of Indiana law[49] had not been met, the general disclaimer was ineffective.[50] The court finally observed that a jury could find that the disclaimer contradicted the express warranty and would therefore be ineffective.[51]

D. The Guest Statute

Guest statutes have been enacted after persistent lobbying on the part of large insurance companies.[52] Although the Indiana guest statute was ostensibly designed to prevent a guest from exploiting a host's kindness and to prevent collusive lawsuits,[53] it has had the unfortunate result of protecting negligent drivers from liability. Litigation under this statute has focused upon two essential questions: (1) whether the injured party was a guest within the purview of the statute, and (2) whether the driver was wilfully or wantonly negligent. To avoid the guest categorization, the injured rider must demonstrate that there was a business rather than a social motive for the trip and that there was an expectation of a substantial material benefit therefrom.[54] Since *Allison v. Ely*,[55] the question of whether there was a sufficient payment was considered to be a question of law. Recently, however, several decisions have held to the contrary.

In *Furniss v. Waters*,[56] the plaintiff paid three dollars per week in order to ride to work with her brother-in-law. The lower

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[49]IND. CODE §§ 26-1-2-316(2), (3) (1971).

[50]286 N.E.2d at 196.

[51]*Id.* at 200. *See generally* Note, *Implied and Express Warranties and Disclaiming Under the Uniform Commercial Code*, 38 IND. L.J. 648 (1963).

[52]*See* PROSSER § 34, at 186-87.

[53]Note, *The Indiana Guest Statute*, 34 IND. L.J. 338 (1959). It has also been argued that these statutes are adopted to protect drivers against liability (no hitchhikers). However, Prosser has written that he "once found a hitchhiker case, but has mislaid it." He has been unable to find another. PROSSER § 34, at 187 n.8.

[54]*See, e.g.*, Liberty Mut. Ins. Co. v. Stitzle, 220 Ind. 180, 185, 41 N.E.2d 133, 135 (1942): "If the trip is primarily for business purposes and the one to be charged receives substantial benefit, though not payment in a strict sense, the guest relationship does not exist." *See also* Richards, *Another Decade Under the Guest Statute*, 24 WASH. L. REV. 101, 102 (1949).

[55]241 Ind. 248, 170 N.E.2d 371 (1960).

[56]277 N.E.2d 48 (Ind. Ct. App. 1971).

court granted a summary judgment finding that the familial relationship was dispositive of the guest issue. Judge Sullivan, writing the opinion for the court of appeals, reversed and held that a single factor, such as familial relationship, cannot be held determinative of the issue when other factors are present.[57] The court felt "the intangible benefits, peace of mind, and familial harmony, which the daily presence of Mrs. Furniss in Mr. Waters' vehicle may have bestowed upon him, to be so substantial and material, in light of the obvious purpose of the daily trips, that Mrs. Furniss might be considered by reasonable minds as a paid passenger."[58] The precedential value of *Allison* was effectively limited in *Furniss* by the court's conclusion that in *Allison* only one possible inference could have been drawn from the facts.[59]

Likewise, in *Schoeff v. McIntire*,[60] a social acquaintance was to help paint a house in return for lunch and transportation. While being driven to the house by the homeowner, the plaintiff suffered injuries in an automobile accident. The lower court entered judgmnt against the defendant. On appeal, the court affirmed, feeling that the finding of a substantial and material benefit could be supported by the facts of this case.[61]

If the guest classification cannot be evaded, the alternative for the plaintiff is to show that the host was guilty of wilful or wanton misconduct. The "wilful and wanton" standard can be disjunctively applied.[62] Generally, to be guilty of wanton misconduct, the driver must have (1) been conscious of an existing hazard or of his misconduct, (2) acted with reckless disregard for the safety of his guest, and (3) known that this conduct subjected the guest to a probability of injury.[63]

The requirement that the host be aware of the existing hazard or of the misconduct has been recently modified to require only constructive knowledge.[64] In other words, the guest need only

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[57]*Id.* at 51.

[58]*Id.* at 52.

[59]*Id.*

[60]287 N.E.2d 369 (Ind. Ct. App. 1972).

[61]*Id.* at 373.

[62]*See, e.g.*, Sausanam v. Leininger, 237 Ind. 508, 146 N.E.2d 414 (1957); McClure v. Austin, 283 N.E.2d 783, 785 (Ind. Ct. App. 1972).

[63]*See* Clouse v. Pedin, 243 Ind. 390, 186 N.E.2d 1 (1962).

[64]Barnes v. Deville, 293 N.E.2d 54 (Ind. Ct. App. 1973).

show that a reasonable man under the circumstances would or should have known of the existence of the hazard or of his misconduct.

The application of the "wilful and wanton misconduct" standard has certainly produced seemingly irreconcilable results. For example, in *McClure v. Austin*[65] evidence was adduced showing that the defendant was driving on the wrong side of the road, exceeding the speed limit on wet pavement, and driving while tired. A directed verdict for the defendant was sustained on appeal. Yet in *Barnes v. Deville*[66] the defendant was speeding on a gravel road with weeds growing onto the road and this was held to be sufficient to justify the submission of the issue to the jury.

Because of the harsh results which follow from the guest statute, these statutes typically invite petty litigation.[67] The ability of a negligent driver to escape liability through a guest statute stands as a monument to the insurance lobby. These statutes contravene holdings in other areas of tort law which are cognizant of the risk spreading capabilities of society. Perhaps the recent equal protection challenge to the California guest statute[68] will signal the collapse of this unfortunate anachronism in Indiana.

E. Slip and Fall Cases

In the genre of cases loosely defined as "slip and fall" suits, it is often difficult for the plaintiff to establish liability. The threshold consideration is whether the proprietor exercised due care with regard to the situation. Encompassed within the scope of this inquiry is whether the owner or occupier of the land had knowledge of the existing condition which caused the fall. Indiana follows the general trend in allowing recovery for constructive knowledge of that condition.[69] A recent Seventh Circuit decision suggested that actual knowledge of a recurring condition would suffice to satisfy the constructive knowledge requirement. In

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[65]283 N.E.2d 783 (Ind. Ct. App. 1972).

[66]293 N.E.2d 54 (Ind. Ct. App. 1973).

[67]Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA LAW. 1, 23 (1968).

[68]Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[69]*See, e.g.*, Galbreath v. City of Logansport, 279 N.E.2d 578 (Ind. Ct. App. 1972); City of Indianapolis v. Roy, 52 Ind. App. 388, 97 N.E. 795 (1912).

Hetzel v. Jewel Co.,[70] the court reversed a verdict for the defendant in a suit which had arisen when the plaintiff slipped on an unknown liquid on the floor in front of a meat counter.[71] The plaintiff claimed that this was a recurring condition of which the defendant had actual knowledge. As a foundation to support its finding that Indiana law allowed recovery under these facts, the court interpreted *Robertson Brothers Department Store v. Stanley*[72] and *Kroger Co. v. Ward*[73] as standing for the proposition that "actual knowledge of the existence of an uncorrected, continuing or recurrent dangerous condition constitutes constructive knowledge of the existence of a specific recurrence."[74] Moreover, the court thought that Indiana tort law was not aberrant and was in harmony with the progressive trend in this regard.[75]

There is no violation of due care if a person slips on a properly waxed floor.[76] However, this principle "does not encompass an application of wax lacking uniformity of distribution."[77] Applying this standard, the court in *Daben Realty Co., Inc. v. Stewart*[78] thought that the facts of the case justified the submission of the issue to a jury. In *Daben*, both the lobby floor and the floor of the adjoining office where the plantiff worked were covered with square asphalt tile. The lobby floor was waxed to a high sheen; the office floor was dirty and sticky. The plaintiff stepped out of the office, into the lobby, and fell. In sustaining a $47,000.00 jury verdict, the court noted that a jury could have reasonably found a "dangerous lack of uniformity in the maintenance of the floor."[79]

In other instances the duty issue has been the stumbling block to the plaintiff. For example, in *Hammond v. Alligretti*[80] the

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[70]457 F.2d 527 (7th Cir. 1972).

[71]*Id.*

[72]228 Ind. 372, 90 N.E.2d 809 (1950).

[73]267 N.E.2d 189 (Ind. Ct. App. 1971).

[74]457 F.2d at 532.

[75]*Id.*

[76]*See, e.g.*, Stephens v. Sears, Roebuck & Co., 212 F.2d 260 (7th Cir. 1954).

[77]Moyer v. Indiana American Legion, Inc., 298 F.2d 46, 47 (7th Cir. 1962).

[78]290 N.E.2d 809 (Ind. Ct. App. 1972).

[79]*Id.* at 811.

[80]288 N.E.2d 197 (Ind. Ct. App. 1972).

court sustained a directed verdict against the plaintiff who slipped and fell on ice in the defendant's parking lot. Refusing to depart from the rule that the owner or occupier of an open air parking lot is under no duty to remove *natural* accumulations of ice and snow, the court held that liability will only be imposed when the property owner creates a more dangerous condition than would be otherwise attributable to the natural accumulation of ice and snow.[81] Paradoxically, such a result rewards the inactive and penalizes the industrious.

Convincing a jury that the plaintiff was not contributorily negligent is perhaps the hardest element of the plaintiff's case. Nevertheless, courts have been reticent to rule that the plaintiff has been contributorily negligent as a matter of law. For example, in *Galbreath v. City of Logansport*[82] a lady caught her toe in a crack by a parking meter and fell, fracturing her leg. The court, in reversing the granting of a motion for judgment on the evidence, indicated that a pedestrian is not bound to keep his eyes constantly upon the sidewalk; thus, he is not negligent as a matter of law for failure to see a defect in plain view.[83]

F. Res Ipsa Loquitur

The doctrine of res ipsa loquitur was held to be a rule of evidence that need not be specifically pleaded in *Phoenix of Hartford Insurance Co. v. League, Inc.*[84] Consequently, the provisions of Trial Rule 9.1(B), providing that res ipsa loquitur may be pleaded, were not deemed to be mandatory. In this case, a plumber was alleged to have started a fire in the basement of an empty house. There was evidence that he had used a torch to fix the pipes. Also, testimony was given that the fire had been started in the vicinity where the plumber had been working. In order to establish liability the court felt that it was "not necessary for the plaintiff to exclude every other possibility other than the defendant's negligence as a cause."[85]

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[81] *Id.* at 200.

[82] 279 N.E.2d 578 (Ind. Ct. App. 1972).

[83] *Id.* at 582. *See also* Hetzel v. Jewel Co., 457 F.2d 527 (7th Cir. 1972); F.W. Woolworth Co. v. Moore, 221 Ind. 490, 493, 48 N.E.2d 644, 645 (1943); Kroger v. Ward, 267 N.E.2d 189, 190 (Ind. Ct. App. 1971). In *Hetzel*, the court wrote that "there is no dearth of slip and fall cases in the Indiana law in which recovery was not barred by the fact of the visibility of the injury-causing condition." 457 F.2d at 529.

[84] 293 N.E.2d 59 (Ind. Ct. App. 1973).

[85] *Id.* at 61.

G. Negligence Per Se

Judge Buchanan, writing without dissent, has firmly fixed upon railroads the duty to install, maintain, and procure replacements of missing signs at railroad crossings. In *Wroblewski v. Grand Trunk Western Railway*,[86] there were no warning signs posted as required by Indiana law. Reversing a directed verdict for the defendants, the court held that the failure of the railroad to have a sign within 300 feet of the tracks was negligence per se.[87] Furthermore, the court stated that this was a safety statute designed to protect exactly this class of plaintiffs[88] against this particular risk of harm.[89] Therefore, Judge Buchanan argued that only the questions of whether there was a sufficient and reasonable excuse for the violation and whether in failing to post these signs the defendant was in fact guilty of actionable negligence remained for the jury.[90] This latter issue, *i.e.*, did the act constitute actionable negligence, should be subsumed under the court's inquiry into the purpose of the statute, the class of litigants protected, and the risk covered by the statute.[91] If these three elements are present, there would seem to be no reason to permit the jury to consider whether it is actionable negligence.[92]

Critics of this approach would contend that the jury rather than the legislature is better equipped to ascertain the community standard. Therefore, it is within the domain of the fact-finder to determine whether the violation of the statute was unreason-

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[86]276 N.E.2d 567 (Ind. Ct. App. 1971).

[87]*Id.* at 571

[88]*Id.* at 575.

[89]*Id.*

[90]*Id.*

[91]*See* Sheridan v. Suida, 276 N.E.2d 883 (Ind. Ct. App. 1971). Although *Sheridan* avoids mention of the pitfall of allowing the jury to find whether there is actionable negligence, this court falls into another trap. In *Sheridan*, the court suggested that the proximate cause issue was determinative. Yet, an inquiry into proximate cause is misplaced if the negligence per se approach is utilized. *See* PROSSER § 36.

[92]Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914). After there is found to be a violation of a statute and the courts leave the question of negligence as a fact to the jury, "they are doing nothing less than informing that body that it may stamp with approval, as reasonable conduct, the action of one who has assumed to place his own foresight above that of the legislature . . . ." *Id.* at 322.

able.[93] If this is the intent of this second standard, it should be much more precisely worded.

H. Retaliatory Discharge from Employment for Filing a Workmen's Compensation Claim

An employee was allegedly discharged for filing a workmen's compensation claim. Finding no direct precedent to control the decision, the supreme court nevertheless held that a claim for damages existed.[94] The court argued that by "denying transfer and allowing the trial court's dismissal to stand we would be arming unethical employers with common law authority"[95] to coerce employees and prevent the filing of claims. Further, the court analogized to the landlord-tenant area, in which many courts have held that a retaliatory eviction may be raised as an affirmative defense.[96] More specifically, reliance was placed upon *Aweeka v. Bonds,*[97] in which a retaliatory eviction was held to constitute an affirmative cause of action. With this background, the court stated that an intentional, wrongful act on the part of the employer could be vindicated by an action for damages.[98]

I. Defenses

1. Imputing Contributory Negligence

Imputing the contributory negligence of one parent to the other when the action is for the death of a child is seldom justifiable and has been heavily criticised.[99] Despite the waning influence of this doctrine elsewhere, the court of appeals in *Sheridan v. Sinda,*[100] for the first time, decided that the negligence of a guardian may *sometimes* be imputed to the parent of the injured

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[93]Lowndes, *Civil Liability Created by Criminal Legislation,* 16 MINN. L. REV. 361, 367 (1932).

[94]Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).

[95]*Id.* at 428.

[96]*Id.*

[97]20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971). In *Aweeka,* the court argued that "it would be unfair and unreasonable to require a tenant, subjected to a retaliatory rent increase by the landlord, to wait and raise the matter as a defense only . . . ." *Id.* at 281, 97 Cal. Rptr. at 652.

[98]297 N.E.2d at 428.

[99]*See* PROSSER § 127, at 914.

[100]276 N.E.2d 883 (Ind. Ct. App. 1971).

child to bar recovery for the death of a child under the wrongful death statute.[101] In *Sheridan,* the father had left his six year-old daughter in the care of her older brother, aged eighteen. The older brother went for a walk on the beach leaving his sister unattended. The stroller in which the tot was riding was struck by the defendant. The court held that in order to impute negligence to a parent, the parent must have had the right to control or regulate the custodian at the time of the accident, and since the plaintiff here had "every legal and equitable right to control the actions"[102] of his son, negligence was imputed to the father.

However, it is difficult to understand the justification here. If an employee of the father instead of the son was similarly negligent would his contributory negligence be imputed to the father? What if the employee was merely a babysitter? Could this defense be extended to a nursery school? Dean Prosser states that this concept "has generally been rejected as a senseless survival of a discarded concept of marital unity."[103] A more palatable result was reached in *Leuch v. Goetz,*[104] wherein the court disapproved of giving an instruction on joint enterprise. When the only evidence was that the husband and wife were embarked upon a family social endeavor, the court thought that this was insufficient to impute the contributory negligence of the driver-husband to the wife under the joint enterprise doctrine.[105]

2. *Some Unsuccessful Defenses*

A temporary barricade which was serving as a false front on a building being remodeled by the defendant collapsed upon the plaintiff as he walked in front of the building in *William H. Stern & Son v. Rebeck.*[106] In seeking to avoid an $80,000.00 judgment, the defendant contended that it was error for the trial court to give an instruction on the act of God defense. The court

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[101] *Id.* at 890.

[102] *Id.*

[103] PROSSER § 127, at 914.

[104] 280 N.E.2d 847 (Ind. Ct. App. 1972). *But see* Hake v. Moorhead, 140 Ind. App. 127, 222 N.E.2d 617 (1966), wherein a married couple was driving to the bank to deposit money derived from a joint business. In this case, the court held that these facts were sufficient to impute the husband's contributory negligence to the wife. This decision is out of harmony with decisions elsewhere.

[105] 280 N.E.2d at 855.

[106] 277 N.E.2d 15 (Ind. Ct. App. 1972).

replied that the defense was not available under the facts of this case, since there was testimony that the windows at the rear of the building which the barricade fronted had not been bricked in by the defendant. This created a tunnel effect which would increase the velocity of the wind approaching the barricade. Accordingly, the court held that the act of God defense was not available as there was not "an entire exclusion of human agency from the cause that produced the injury . . . ."[107]

Another defendant tendered an "unavoidable accident" instruction to the court.[108] The plaintiff had objected to the instruction "for the reason that there was no evidence to which said instruction would be applicable."[109] The court specifically agreed with the plaintiff that it has been consistently held improper to give "pure accident" or "unavoidable accident" instructions as they do not connote affirmative defenses[110] and can only serve to confuse jurors.[111] But, the court refused to consider the matter as grounds for reversal because the plaintiff had not complied with Trial Rule 51 (C) by specifically stating the grounds and subject matter of her objection.[112]

Finally, in *Wallace v. Doan*,[113] instructions upon contributory negligence were withdrawn pursuant to the Indiana rule that it is reversible error for the court to refuse to withdraw the question of contributory negligence when there is no evidence or inference of such. Evidence that the plaintiff was driving twenty miles per hour on a preferential thoroughfare and looking straight ahead was introduced. The defendant contended that the plaintiff was under a duty to keep a lookout for vehicles which might emerge from a nonpreferential street and that this duty was violated, thereby creating a question for the jury as to the plaintiff's contributory negligence. Judge Lowdermilk, writing for the court of appeals, held that the plaintiff had a right to assume that any person about to enter or traverse a preferential street would obey the law, that the plaintiff had no duty to be on the

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[107]*Id.* at 19.

[108]Conley v. Lothamer, 276 N.E.2d 602 (Ind. Ct. App. 1972).

[109]*Id.* at 603.

[110]*Id.* at 604.

[111]*Id.*

[112]*Id.* at 605.

[113]292 N.E.2d 820 (Ind. Ct. App. 1973).

lookout for such persons, and that the plaintiff was not guilty of contributory negligence as a matter of law.[114]

J. Contribution Among Tortfeasors

Fictions have been employed to circumvent the general proposition that a release of one joint tortfeasor is a release of all.[115] In *Northern Indiana Public Service Co. v. Otis*,[116] loan receipt agreements were added to covenants not to sue[117] and covenants not to execute as a means to avoid the applicability of this rule. In this case, the court was faced with an agreement between the plantiff and one of the joint tortfeasors, wherein the defendant "loaned" $50,000 to the plaintiff without interest and only repayable to the extent that the plaintiff recovered a verdict against the other tortfeasor. Furthermore, the agreement provided that if the verdict was only against the defendant, NIPSCO, then the $50,000 was to be subtracted from the verdict. If the verdict was against both, the plaintiff agreed that he would only execute against the other wrongdoer. The court stated that the plaintiff could have elected to sue only one defendant or "to levy execution on a judgment against either tortfeasor and receive full satisfaction thereof against either . . . ."[118] "She could have received part satisfaction from one tortfeasor in consideration for a covenant not to execute and proceeded for the balance of the judgment against the remaining tortfeasor," or "she could have executed a covenant not to sue as to one potential joint tortfeasor and proceeded against the other."[119] The court concluded that the "loan receipt agreement . . . [did] not conflict with any of these rules but [represented] a permissible innovation . . . ."[120] This technique was

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[114]*Id.* at 825.

[115]*See* 37 NOTRE DAME LAW. 448 (1962).

[116]145 Ind. App. 159, 250 N.E.2d 378 (1969).

[117]The theoretical justification in construing a covenant not to sue as having a different effect from a release

> . . . lies in the distinction between the *effects* of the two. Where a release extinguishes a cause of action, a covenant not to sue merely makes the remedy inaccessible, and so meets the dissolution of an indivisible cause of action. A few courts are more forthright, and reject any such distinction.

37 NOTRE DAME LAW. 448, 452 (1962).

[118]145 Ind. App. at 179, 250 N.E.2d at 392.

[119]*Id.*

[120]*Id.*

favorably cited for the policy reasons that there is an economic need for such payments by a severely injured plaintiff, especially in view of the hardships imposed upon such a party by lengthy legal proceedings.[121]

Scott v. Krueger[122] recently reaffirmed the *Otis* case and expressed the opinion that covenants not to sue, covenants not to execute, and loan receipt agreements are to be encouraged in the settlement of litigation.[123] *Scott* concerned the issue of whether a covenant not to execute agreed upon by the plaintiff and one of the codefendants should have been presented to the jury as evidence. This agreement had been formulated while the jury was deliberating. The court held under the facts of this case that such an agreement was not required to be presented to the jury for their consideration;[124] indeed the contrary view that such a move would have been grounds for a reversal was intimated.[125]

Yet an even more important step in this area was taken in *Wecker v. Kilmer*.[126] In *Wecker*, the Indiana Supreme Court was considering a certified issue of law from the Seventh Circuit Court of Appeals to clarify the existing Indiana precedents in regard to whether a subsequent tortfeasor who aggravated an injury caused by an original tortfeasor is released by a general release executed in favor of the original tortfeasor. The plaintiff had executed a release in favor of the original tortfeasor who had injured the plaintiff in an automobile accident. While being treated for the injuries sustained in this accident, the plaintiff suffered further injuries by the negligence of the attending physician.

The court refused to accept the "prevailing view" that this release of the original tortfeasor released all subsequent tortfeasors for aggravation of these injuries.[127] The rationale of this "prevailing view" was the proximate cause theory—"the argument goes that since a general release to the original tortfeasor would include release of liability for aggravation . . . proximately resulting, such a release must be deemed to embrace any claim for

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[121] *Id.* at 179-80, 250 N.E.2d at 392.

[122] 280 N.E.2d 336 (Ind. Ct. App. 1972).

[123] *Id.* at 357.

[124] *Id.*

[125] *Id.*

[126] 294 N.E.2d 132 (Ind. Ct. App. 1973).

[127] *Id.* at 135.

the same aggravation against the negligent physician."[128] The court rejected this analysis and adopted a two-pronged test. In determining the effect of a release of an original tortfeasor the court should examine "(1) [w]hether the injured party has received full satisfaction; and (2) [w]hether the injured party *intended* that the release be in full satisfaction of the party's claim . . . ."[129] Extrinsic proof would be allowed to show the intent of the parties.[130]

The precedential value of this opinion could well erase the general law in regard to releases. Basically, three policy arguments were given to support the opinion. First, the fear of double recovery was thought to be unjustified since any amount "received from the original tortfeasor for the release would have to be credited against any amounts received in an action against a subsequent tortfeasor."[131] Moreover, the subsequent tortfeasor will never be liable for more damages than those caused by his own actions. Secondly, the court found the prevailing view illogical in that the original tortfeasor here disclaimed any liability in the release; if someone were injured in an accident where no one was at fault and his injuries were subsequently aggravated by the negligent acts of a physician, he would not be without a cause of action against the physician.[132] There was no proof that the alleged original tortfeasor was in fact a tortfeasor. It should only be to avoid unjust enrichment and prevent double recovery that any monies received from other sources would be credited against a recovery from a negligent physician. Third anomalously, wrongdoers who do not make or share in the reparation of the injuries are discharged, while one willing to right the wrong bears the whole loss.[133] None of these reasons are any more cogent with respect to tortfeasors subsequent in time than with joint tortfeasors.

K. Agency

Whenever the liability of one of the defendants must be predicated upon the respondeat superior doctrine, the appellate courts

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[128] *Id.* at 134. For an example of a contrary result, see Clark v. Zimmer Mfg. Co., 290 F.2d 849 (1st Cir. 1961).

[129] 294 N.E.2d at 135.

[130] *Id.*

[131] *Id.* at 134.

[132] *Id.*

[133] *Id.* at 135.

have reserved this issue for the jury if any reasonable inference to be drawn from the facts would support a finding for the plaintiff on this issue. Such factual situations as a salesman's returning to lunch after calling on customers,[134] a wife's delivering her husband's paper route,[135] and a truck driver's driving a truck which had failed inspection and had been removed from the list of trucks eligible to driven,[136] were all encompassed within the above principle. In defining the scope of employment for purposes of the respondeat superior relationship, the courts have looked to see who has the "right to control"[137] the employee. This test "refers only to the right and not the exercise of control over the servant."[138] Numerous factors have been articulated to make this finding somewhat less onerous such as "the right to discharge, mode of payment, supplying of tools or supplies by the employer, belief by the parties in the existence of a master-servant relationship, control over the means used or result reached, length of employment and the establishing of work boundaries."[139]

One decision, certain to have controversial importance in this area, is *Estes v. Hancock County Bank*.[140] Criminal charges based upon an affidavit signed by a bank president were brought against the plaintiff for the deceptive issuance of a check. This action was for malicious prosecution against both the president and the bank. A jury verdict exonerated the bank president, but a $20,000 verdict was levied against the bank. The court of appeals reversed the trial court's judgment for the bank despite the jury verdict and argued that a jury could have logically thought that the president was not liable in his personal capacity but was so negligent within the scope of employment as to impute this to the bank.[141] Granting the motion to transfer, the supreme court

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[134]Wilson v. Kauffman, 296 N.E.2d 432 (Ind. Ct. App. 1973).

[135]Gibbs v. Miller, 283 N.E.2d 592 (Ind. Ct. App. 1972).

[136]Watson v. Tempco Transp., Inc., 281 N.E.2d 131 (Ind. Ct. App. 1972).

[137]283 N.E.2d at 594-95.

[138]*Id.* at 595. *See also* Palmer v. Stockberger, 135 Ind. App. 263, 193 N.E.2d 384 (1963); New York Cent. R.R. v. Northern Ind. Pub. Serv. Co., 140 Ind. App. 79, 221 N.E.2d 442 (1966).

[139]285 N.E.2d at 595. *See also* RESTATEMENT (SECOND) OF AGENCY § 220, at 485 (1958).

[140]276 N.E.2d 540 (Ind. Ct. App. 1971), *rev'd*, 289 N.E.2d 728 (Ind. 1972).

[141]*Id.* at 548.

reversed and reinstated the trial court's judgment. Justice Arterburn, writing for a three-man majority, first queried whether the bank should be held liable for the actions of its exonerated president. It answered this question by stating that these facts "require a judgment in favor of the employer where the liability of the employer is grounded *solely* upon the activities of the employee."[142] The court was careful to point out that the holding did not disturb the rule that a principal could be held liable despite a verdict in favor of a joined servant[143] if the master has himself been guilty of acts which can be the basis for liability. Under this rationale, a corporation could be found guilty of implied malice despite the "good faith" of the employee who performs the act. For example, a corporation could instruct its servants to do some act which violated someone's rights although the acting servant was unaware of the underlying facts upon which he was acting. Thus, although the principal was heedlessly disregarding the rights of others, the agent could be absolved of liability. Analogously, if the employees were given inadequate instructions or training or were selected in a grossly negligent fashion, this could again imply a heedless disregard of the rights of the public. Expressed otherwise, the corporation's mental state "as to the existence of malice was dependent upon that of some agent or employee of the bank."[144] However, the plaintiff in this case had framed the issues upon the actions of the president, who was subsequently released from liability by the jury verdict. The dissent, on the other hand, reasoned that since an inconsistent verdict had been returned, there should be a remand for a new trial.[145]

L. Damages

While other jurisdictions are experimenting with alternative means to allow recovery for mental anguish negligently or intentionally caused,[146] Indiana has remained a bastion of the physical injury test—"[i]t is the general rule of law that damages for mental suffering, pain, fright, shock, and mental anguish are recoverable

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[142]289 N.E.2d at 730.

[143]*Id.*

[144]*Id.*

[145]*Id.* at 732.

[146]*See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1032 (1936); 44 IND. L.J. 478 (1969); 44 NOTRE DAME LAW. 632 (1969).

only when accompanied by and resulting from a physical injury."[147] Confining the discussion to a review of Indiana authorities, the court in *Jeffersonville Silgas, Inc. v. Otis,*[148] applied the above rule and overturned an award of damages for mental anguish. The plaintiff, in that case, had purchased a fuel tank from the defendants. Several years later the defendants approached the plaintiff's wife and informed her that they were going to reclaim this tank since it had not been refilled. She told them to speak to her husband. Without doing so, they removed the fuel tank while the plaintiff was not present. This action was brought for conversion, alleging, *inter alia,* punitive damages and damages for mental health. The plaintiff thought "that damages for mental anguish were proper and supported by evidence of harrassment and mental distress."[149] Few jurisdictions allow recovery for mental anguish caused by the disturbance of one's property rights. Reasoning that such an injury is not within the scope of the risk, these courts feel that this is an idiosyncratic and nonforeseeable reaction.[150] However, "if the actor can be charged with notice that his conduct entails unreasonable risk of harm he may be liable for injury even though the cause-effect sequence are [*sic*] unusual."[151] For example, in *Preiser v. Willandt,*[152] the plaintiff notified the landlord that because of a heart condition and her pregnancy she would be unable to move the next day. Ignoring this, the house was torn down according to the original plan. The emotional distress resulting from these actions was held not to be too remote a consequence to be actionable.

Moreover, "that debtors ought to be protected from being bedeviled and harrassed by offensive, high-pressure, extra-legal methods of collection is a sentiment definitely crystallizing in the cases."[153] Because the court of appeals considered the facts of

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[147]Jeffersonville Silgas, Inc. v. Otis, 290 N.E.2d 113, 117 (Ind. Ct. App. 1972).

[148]290 N.E.2d 113 (Ind. Ct. App. 1972).

[149]*Id.* at 116.

[150]Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 243 (1944).

[151]*Id.* at 244.

[152]48 App. Div. 569, 62 N.Y.S. 890 (1900).

[153]Magruder, *supra* note 146, at 1063.

Jeffersonville Silgas insufficient to warrant a finding of harrassment,[154] it is unclear whether such an action would be maintainable under more blatant abuse of creditor process.

Aetna Life Insurance Co. v. Burton,[155] involving an autopsy performed without the consent of the wife in which the deceased had a bloody looking substance running from his nose, and *Indiana Railroad v. Orr*,[156] involving a plaintiff wrongfully ordered off a streetcar, were cited by the plaintiff as sustaining his argument that no physical injuries are needed. These cases were dismissed as sui generis, apparently intimating that the physical injury test remained solidly imbedded in Indiana law. Notably, however, there was an oblique reference to the contact requirement test.[157]

Moreover, in *Jeffersonville Silgas*, the $5000 punitive damage award was also reversed; the court held that malice, fraud, oppression, gross negligence, or wilful and wanton misconduct had not been demonstrated by the plaintiffs.[158] Specifically, the court noted that the "wilful and wanton misconduct" standard was to be conjunctively applied.[159] Many courts have applied a different standard—*i.e.*, whether the wrongdoer acted with a "heedless disregard of the consequences."[160] Unlike the court in *Jeffersonville Silgas*, these courts have been reluctant to withdraw the punitive damage issue from the fact-finder. In *Jeffersonville Silgas*, the plaintiffs had a contract specifically divesting the defendants of all ownership in the fuel tank; they had been referred to the plaintiff, with whom they never consulted, to discuss the issue; they seized the tank while the plaintiff and his wife were absent; and when the plaintiff went to see the defendant in regard to this seizure, they erroneously told the plaintiff that this tank was not his. Assuredly, under the standard enunicated in other decisions,[161] reasonable inferences could be drawn that the defendants acted in "heedless disregard" of the rights of others.

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[154]290 N.E.2d at 118.

[155]104 Ind. App. 576, 12 N.E.2d 360 (1938).

[156]41 Ind. App. 426, 84 N.E. 32 (1908).

[157]290 N.E.2d at 118.

[158]*Id.* at 116.

[159]*Id.*

[160]*See* Bob Anderson Pontiac, Inc. v. Davidson, 293 N.E.2d 232 (Ind. Ct. App. 1973); Capital Dodge, Inc. v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972).

[161]*See* cases cited note 160 *supra*.

If the damages are not easily ascertainable, the appellate courts have refused to overturn verdicts for inadequacy or excessiveness[162] and have relied instead upon the judgment of the fact-finder or the lower court judge with his powers under Trial Rule 59(E)(5) to utilize an additur[163] or remittitur.[164]

M. Conclusion

To attempt to assess tort trends by an examination of recent case law invites a microscopic distortion of the whole common law organism. Nonetheless, several generalizations can safely be made. First, the appellate courts have been unafraid to create a precedent when an injured party was remediless under the common law. Indeed, the decision to allow recovery for a retaliatory discharge from employment for filing a workmen's compensation claim illustrates the flexibility of the judicial response to new problems. Moreover, the rapid growth of the products liability field points out the unlimited creative potentiality of the judicial branch in structuring precedents for injured parties. Secondly, the courts have overruled decisions when they have become untenable under modern practice. Abrogation of the sovereign immunity doctrine and the interspousal immunity privilege and the renovation of contribution law are examples of this approach. Finally, these cases demonstrate the willingness of the judiciary to shift the losses of injured individuals to society whenever possible. In short, this recent period has produced an important and laudatory reformation of Indiana tort law principles.

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[162]*See, e.g.*, Rodinelli v. Bowden, 293 N.E.2d 812 (Ind. Ct. App. 1973); Bonek v. Plain, 288 N.E.2d 185 (Ind. Ct. App. 1972); William H. Stern & Son v. Rebeck, 277 N.E.2d 15 (Ind. Ct. App. 1972).

[163]*See* Borowski v. Rupert, 281 N.E.2d 502 (Ind. Ct. App. 1972).

[164]288 N.E.2d 185 (Ind. Ct. App. 1972).